ANNUAL REPORT

Environmental Review Tribunal

April 1, 2007 to March 31, 2008

ANNUAL REPORT

Environmental Review Tribunal

April 1, 2007 to March 31, 2008

Table of Contents

Message from the Chair 1

The Tribunal's Mandate 2
- Core Functions of the Tribunal 3
- The Tribunal's Rules of Practice and Practice Directions 5
- In-House Learning Programs 5

Tribunal Activities for 2007-2008 6
- Total Number of Cases Carried Forward, Received and Closed 2005-2006/2006-2007/2007-2008 7
- Total Number of Cases in 2006-2007; 2007-2008 by Case Type 8
- Total Number of Appeals/Applications Received by Case Type Fiscal Years 2003-2004 to 2007-2008 9
- Total Number of Requests for Hearing Received Fiscal Years 2003-2004 to 2007-2008 10
- Consolidated Hearings under the *Consolidated Hearings Act* 11

Summaries of Decisions and Significant Orders 12

Consolidated Hearings Act
- Central Milton Holdings Limited and 665497 Ontario Limited (Decision) 12
- Re County of Simcoe Landfill Site (Decision) 13
- Re Creekbank Developments Limited (Decision) 14
- Re Hamilton General Homes (1971) Ltd. (Decision) 14
- Re Peter A. Fisher (Decision) 16

Environmental Bill of Rights, 1993
- Cushman v. Director, Ministry of the Environment (Decision) 18
- Dawber v. Director, Ministry of Environment (Decision) 19
- Marshall v. Director, Ministry of the Environment (Decision) 21
- Passmore on behalf of the North Aldershot Preservation Association v. Director, Ministry of Environment (Decision) 23
- Rapski v. Director, Ministry of the Environment (Decision) 23
- Spellman v. Director, Ministry of the Environment (Decision) 24

Environmental Protection Act
- 1446751 Ontario Inc. v. Director, Ministry of the Environment (Decision) 26
- 1512179 Ontario Ltd. o/a Top Notch Restaurant and Motel v. Director, Ministry of the Environment (Decision) 26
- 1543850 Ontario Inc. v. Director, Ministry of the Environment (Order) 27
- A.B.P. Recycling Inc. v. Director, Ministry of the Environment (Decision) 28
- Baker v. Directors, Ministry of the Environment (Order) 28
- Baker v. Director, Ministry of the Environment (Order) 30
- Dow AgroSciences Canada Inc. Director, Ministry of the Environment (Decision) 32

Friends Sweets & Tandoori Restaurant v. The Corporation of the City of Brampton (Decision) 33
General Chemical Industrial Products Inc. v. Director, Ministry of Environment (Order) 34
General Chemical Industrial Products Inc. v. Director, Ministry of the Environment (Order) 35
General Chemical Industrial Products Inc. v. Director, Ministry of the Environment (Order) 37
Inter-Recycling Systems Inc. v. Director, Ministry of the Environment (Order) 38
Inter-Recycling Systems Inc. v. Director, Ministry of the Environment (Decision) 39
Lavoie on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca, and Ottawa Landfill Watch v. Director, Ministry of Environment (Decision) 40
Lavoie on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca, and Ottawa Landfill Watch v. Director, Ministry of the Environment (Decision) 41
Limoges v. Director, Ministry of Environment (Decision) 41
Maple Leaf Foods Inc. v. Director, Ministry of Environment (Decision) 42
Angelo Menegotto v. Director, Ministry of the Environment (Decision) 42
Region of Huronia Environmental Services Ltd. v. Director, Ministry of the Environment (Decision) 43
Shouldice Designer Stone Ltd. v. Director, Ministry of the Environment (Decision) 43
Sobczak v. Director, Ministry of Environment (Decision) 43
Starnino Holdings Limited v. Director, Ministry of Environment (Order) 44
Starnino Holdings Limited v. Director, Ministry of Environment (Order) 45
Starnino Holidngs Limited v. Director, Ministry of the Environment (Decision) 46
Starnino Holdings Limited v. Director, Ministry of the Environment (Order) 49
Tonolli Canada Limited v. Director, Ministry of the Environment (Decision) 50

Niagara Escarpment Planning and Development Act

453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Order) 50
453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Order) 51
453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Decision) 52
Albright v. Niagara Escarpment Commission (Decision) 53
Baleka v. Niagara Escarpment Commission (Decision) 54
Barlow v. Niagara Escarpment Commission (Decision) 54
Behan v. Niagara Escarpment Commission (Decision) 55
Bloom v. Niagara Escarpment Commission (Decision) 56
Boles v. Niagara Escarpment Commission (Decision) 57
Briggs v. Niagara Escarpment Commission (Decision) 57
Caetano v. Niagara Escarpment Commission (Decision) 58
Condotta v. Niagara Escarpment Commission (Decision) 59
Cooper v. Niagara Escarpment Commission (Decision) 59
Davies v. Niagara Escarpment Commission (Decision) 60
Laxton v. Niagara Escarpment Commission (Decision) 60

Merriam v. Niagara Escarpment Commission (Decision) 61
Mueller v. Niagara Escarpment Commission (Decision) 62
Paletta International Corporation v. Niagara Escarpment Commission (Decision) 63
Paletta International Corporation v. Niagara Escarpment Commission (Order) 64
Paletta International Corporation v. Niagara Escarpment Commission (Decision) 65
Pemberton v. Niagara Escarpment Commission (Decision) 66
Rauchfleisz v. Niagara Escarpment Commission (Decision) 67
Rehak v. Niagara Escarpment Commission (Decision) 68
Renchko and Hunter v. Niagara Escarpment Commission (Order) 69
Stacey v. Niagara Escarpment Commission (Decision) 69
Szabo v. Niagara Escarpment Commission (Decision) 70
Waugh v. Niagara Escarpment Commission (Decision) 70
Zarifis v. Niagara Escarpment Commission (Decision) 71

Ontario Water Resources Act

Crest Centre (Meadowcrest) Inc. v. Director, Ministry of the Environment (Order) 71
Crest Centre (Meadowcrest) Inc. v. Director, Ministry of the Environment (Decision) 72
CVRD Inco Limited v. Director, Ministry of the Environment (Decision) 73
Davidson v. Director, Ministry of the Environment (Decision) 73
Magna Structural Systems Inc. v. Director, Ministry of the Environment (Decision) 74
Municipality of North Perth v. Director, Ministry of Environment (Decision) 74
Rapski v. Director, Ministry of the Environment (Decision) 75
Waste Management of Canada Corporation v. Director, Ministry of the Environment (Decision) 75

Safe Drinking Water Act, 2002

Ontario Clean Water Agency v. Director, Ministry of the Environment (Decision) 76

Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal 78
Trent Talbot River Property Owners's Association, Marchand Lamarre and Jodi McIntosh v. Director, Ministry of the Environment 78

Report on Performance Measures Fiscal Year 2007-2008 80

Appendix A - Overview of Relevant Legislation 85
Appendix B - Profile of Tribunal Members 97
Appendix C - Learning Programs 102
Appendix D - Key Performance Goals and Objectives For Next Fiscal Year 2008-2009 104
Appendix E - Website Statistics - Downloads 110
Appendix F - Financial Report 111
Appendix G - Contact Information 112

Message from the Chair

This fiscal year, 2007-2008, has been a very busy year for the Tribunal.

In June 2007, the Tribunal acquired new responsibilities as the appellate body for appeals under the *Clean Water Act, 2006*. In July 2007, the Tribunal was named the Hearing Office for matters under the *Greenbelt Act, 2005*. With these additional responsibilities, the Tribunal now adjudicates appeals, applications and referrals under 12 statutes.

On August 22, 2007, the Facilitator of the Agency Cluster released his final report which recommended that the Environmental Review Tribunal co-locate with the Assessment Review Board, the Board of Negotiation, the Conservation Review Board and the Ontario Municipal Board. The Tribunal re-located to its new offices at 655 Bay Street on March 3, 2008.

As part of the Agency Cluster transition, the Tribunal's website was updated with a consistent look, as well as improvements to the ease of use and layout. During this last fiscal, the Tribunal expanded the number of decisions that are posted in its archives. All decisions of the Office of Consolidated Hearings have now been posted on our website.

On November 15, 2007, the Tribunal revised its Rules of Practice and Practice Directions, which were also posted on our website.

I am very pleased to report that we have exceeded our performance targets for the timely release of Members' decisions and the scheduling of hearings.

During this past fiscal year, Robert Wright was appointed as a Vice-Chair, replacing Heather Gibbs, who became a part-time Member. Alan Levy, Dayna Scott and Marcia Valiante were also appointed as part-time Members. The terms for three part-time Members expired this past fiscal year: Franco Mariotti, George Ozburn and Mary Schwaas. I want to thank them for their contribution to the work of the Tribunal.

I would like to thank all Tribunal Members and Staff for their continuous efforts to meet our performance targets and commitment to fulfill the Tribunal's mandate.

Toby Vigod

Chair

June, 2008

The Tribunal's Mandate

The Environmental Review Tribunal (Tribunal) was established under the *Environmental Review Tribunal Act, 2000.*

The Tribunal is a quasi-judicial administrative tribunal, subject to procedural fairness, the rules of natural justice, requirements of its governing legislation and the *Statutory Powers Procedure Act.* The Tribunal adjudicates applications and appeals under the following statutes: *Clean Water Act, 2006*, *Consolidated Hearings Act, Environmental Assessment Act*, *Environmental Bill of Rights, 1993, Environmental Protection Act*, *Niagara Escarpment Planning and Development Act, Nutrient Management Act, 2002, Ontario Water Resources Act*, *Pesticides Act*, and *Safe Drinking Water Act, 2002.* The Tribunal also hears matters under the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005*. See Appendix A for an overview of the legislation governing the work of the Tribunal.

Under the *Niagara Escarpment Planning and Development Act*, Members of the Tribunal are appointed by the Minister of Natural Resources as Hearing Officers to conduct hearings. The Hearing Officers make recommendations concerning appeals of decisions of the Niagara Escarpment Commission regarding development permit applications. Members are also appointed to conduct public hearings for the purpose of making recommendations regarding proposed Niagara Escarpment Plan (NEP) amendments. Every 10 years, Members conduct hearings to review the NEP.

The Tribunal has the administrative responsibility for hearings requested under the *Consolidated Hearings Act.* These hearings are conducted under the designation of the Office of Consolidated Hearings. Under the authority of the *Consolidated Hearings Act,* a Joint Board is established in order to eliminate a multiplicity of hearings before different tribunals under various acts on matters relating to the same undertaking. A Joint Board usually consists of Members of the Tribunal and the Ontario Municipal Board. A Joint Board is empowered to hold a hearing to consider all of the matters under all of the acts that govern the undertaking and for which hearings are required.

The principal task of Tribunal Members, who are Order-in-Council appointees, is to conduct fair, efficient and impartial hearings. Tribunal Members must consider all the evidence presented, and make decisions (or recommendations) with written reasons based on that evidence, in a manner that protects the environment and is consistent with the Tribunal's governing legislation. A profile of the Tribunal Members is found at Appendix B.

Core Functions of the Tribunal

The Environmental Review Tribunal has four main functions which are:

1. **Pre-Hearings, Hearings and Decision Making**
2. **Staff Processing of Hearings**
3. **Mediation**
4. **Public Access**

1. PRE-HEARINGS, HEARINGS AND DECISION MAKING

The Tribunal Members, all of whom are Order-in-Council appointees, are responsible for these functions which include the conduct of hearings and the issuance of written decisions.

All reports arising from appeals of development permit applications under the *Niagara Escarpment Planning and Development Act* (*NEPDA*) are required by legislation to be issued within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Recommendations for Niagara Escarpment Plan amendment applications must be rendered no more than 60 days after the conclusion of the hearing or within such extended time as specified by the Niagara Escarpment Commission. Tribunal decisions on Leave to Appeal applications under the *Environmental Bill of Rights, 1993* are to be issued within 30 days of the filing date of the application, unless the Tribunal determines that, due to unusual circumstances, a longer period is required. In all other types of decisions, Tribunal Members have endeavoured to render their decisions within 60 days of the completion of the hearing or the filing of final written submissions (if ordered by the hearing panel).

2. STAFF PROCESSING OF HEARINGS

The processing of appeals/applications includes all administrative steps necessary to schedule and resolve an appeal/application from the date of filing to the closing of the file. The Tribunal hears appeals/applications/referrals pursuant to 12 different statutes. For example, when an appeal/application is received, it is dealt with through an administrative process that includes:

- screening the appeal/application for compliance with the Act under which the appeal/application was filed;
- assigning the appropriate hearing process which includes obtaining further information;
- scheduling the hearing;
- monitoring and managing the hearing process until a written decision is rendered and the file is closed.

3. MEDIATION

The use of mediation in the hearing process encourages the parties to discuss the issues in dispute in an attempt to narrow or settle their differences. The successful results often eliminate the need for a hearing or reduce the scheduled number of days.

The Members who conduct Tribunal mediations have received certified training. Mediation, which is offered in all appeal and application hearings (except in matters under the *NEPDA*) is conducted after a preliminary hearing and generally, 30 days before the commencement of a hearing. Should the parties choose not to participate at that time, mediation services are available throughout the hearing process, upon request.

4. PUBLIC ACCESS

The Tribunal's outreach function consists of a number of initiatives provided on the website which includes the availability of Guides that explain the Tribunal's role and procedures, and provide up-to-date information regarding the activities of the Tribunal. The website lists the appeals/applications received, hearings scheduled, and also provides access to decisions, orders and forms, relevant statutes and the Tribunal's Rules of Practice and Practice Directions.

The Tribunal's outreach function also includes staff responses to questions from parties, public speaking, and stakeholder consultation. The Tribunal seeks feedback regarding new Rules, policies, procedures and general operational issues from its Client Advisory Committee. The public can also provide feedback to the Tribunal by completing the form provided on the Tribunal's website.

The Tribunal's Rules of Practice and Practice Directions

The Tribunal's Rules of Practice and Practice Directions remain open to review and revision as circumstances and new legislation may dictate in order to reflect the changing needs of the Tribunal and the public. The Tribunal's Rules of Practice and Practice Directions are available on the Tribunal's website or by paper copy, upon request.

In-House Learning Programs

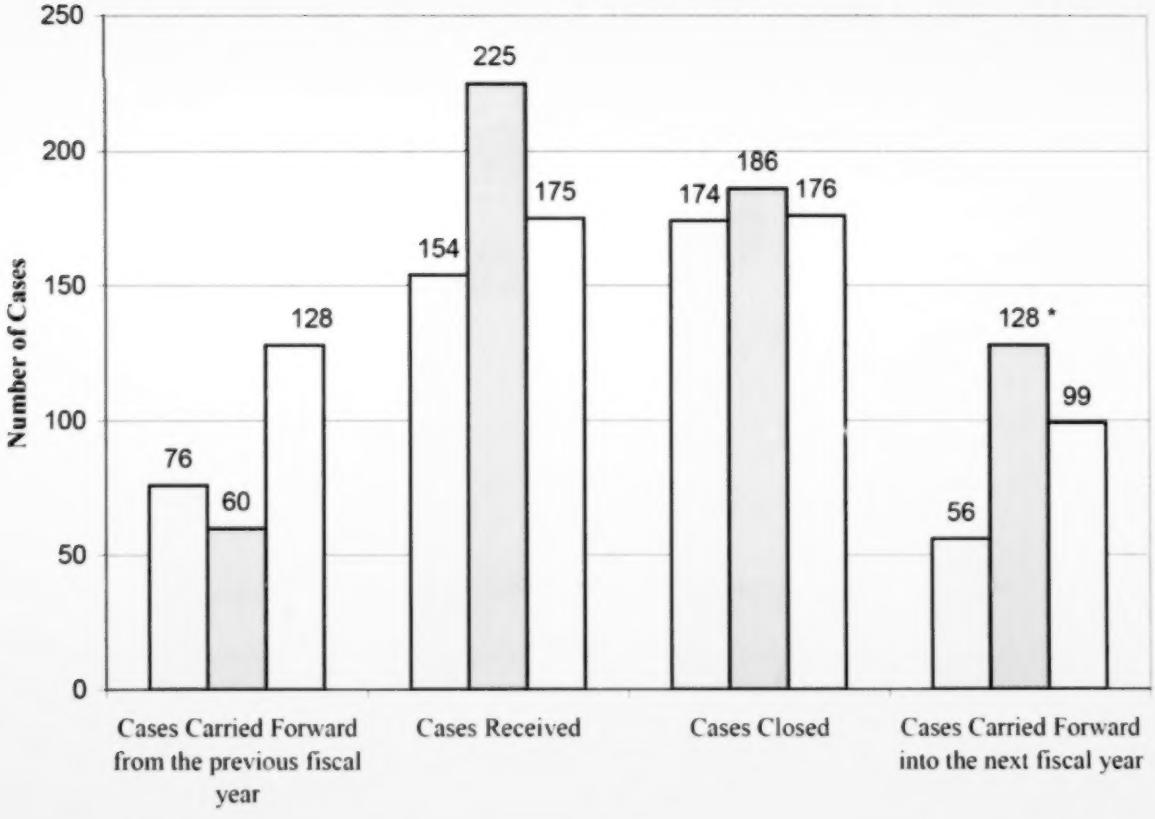
The Tribunal continues to conduct in-house Learning Programs for its Members and staff. The Learning Programs provide opportunities for the Tribunal to invite and hear guest speakers and to receive information on relevant environmental and planning issues. This fiscal year, the Tribunal hosted a number of outstanding speakers. See Appendix C for a complete list of Learning Programs held during this fiscal year.

Tribunal Activities for 2007-2008

Case Type	No. of Unresolved Cases from 2006-2007	No. of New Cases Received	No. of Cases Resolved by Decision of the Tribunal*	No. of Cases Resolved by Tribunal Approved Settlements	No. of Cases Closed by Other Means**	No. of Cases Carried Forward into 2008-2009	No. of Hearing Days held***	No. of Motion Days held	No. of Mediation Days held	No. of Pre-Hearing Conference Days held****	No. of Requests for Costs
EPA											
Appeals	47	37	16	4	14	50	62	7	7	N/A	
OWRA											
Appeals	9	18	2	8	3	14	16	5	4	N/A	
SDWA, 2002											
Appeals	1	2	0	0	1	2	2	0	0	N/A	
NEPDA											
Development Permit Appeals	48	110	57	1	41	31	18	0	N/A	28	2
CHA											
Applications	4	0	3	1	0	0	20	0	0	N/A	1
EBR, 1993*****											
Leave to Appeal Applications	19	8	22	0	3	2	0	1	0	N/A	1
Total	128	175	100	14	62	99	118	12	11	28	4

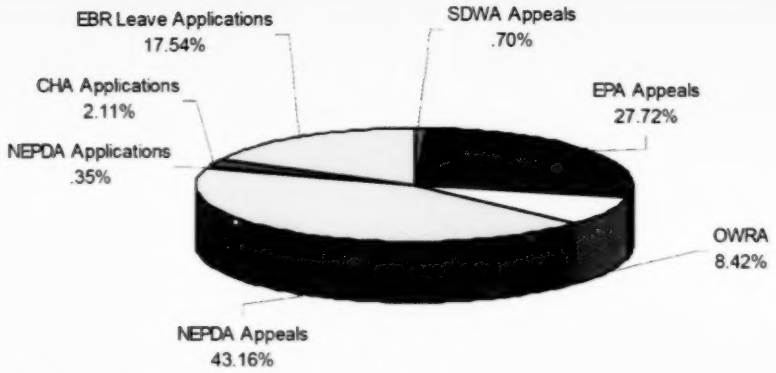
* Includes recommendations under the *NEPDA*.
** Withdrawal by applicant/appellant; case abandoned; settlement reached after mediation, etc.
*** Includes preliminary hearings.
**** Applies to Development Permit Appeals only.
***** Written hearings

Total Number of Cases Carried Forward, Received and Closed

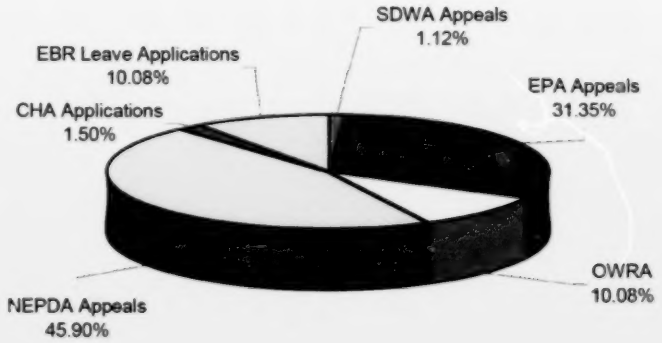


*In the 2006-2007 Annual Report this was reported as 93. The correct number of cases carried forward was actually 128.

Total Number of Cases in 2006-2007 by Case Type



Total Number of Cases in 2007-2008 by Case Type



Total Number of Appeals/Applications Received by Case Type

Fiscal Years 2003 – 2004 to 2007 – 2008

	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
Environmental Bill of Rights, 1993	21	11	8	48	8
Environmental Protection Act	63	49	41	52	37
NEPDA – Development Permits	84	74	82	105	110
Nutrient Management Act, 2002*	0	0	1	0	0
Ontario Water Resources Act	30	11	15	18	18
Ontario Regulation 459 (Walkerton)**	3	N/A	N/A	N/A	N/A
Pesticides Act	0	0	1	0	0
Safe Drinking Water Act, 2002**	18	15	0	1	2
Clean Water Act, 2006***	N/A	N/A	N/A	N/A	0

* Date Proclaimed July 1, 2003

** Date Revoked June 1, 2003

*** Date Proclaimed June 1, 2003

**** Date Proclaimed June 3, 2007

Total Number of Requests for Hearing Received

Fiscal Years 2003 – 2004 to 2007 – 2008

	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008
Consolidated Hearings Act	4	5	2	1	0
***NEPDA* – Plan Amendments**	1	0	4	0	0
Oak Ridges Moraine Conservation Act, 2001*	N/A	N/A	N/A	0	0
Greenbelt Act, 2005**	N/A	N/A	N/A	N/A	0

* **On July 31, 2006, the Tribunal received authority to be the Hearing Officer**

** **On July 6, 2007, the Tribunal received authority to be the Hearing Officer**

Consolidated Hearings under the *Consolidated Hearings Act*

The Environmental Review Tribunal has administrative responsibility for the *Consolidated Hearings Act* (*CHA*). This administrative responsibility is conducted under the designation of the Office of Consolidated Hearings. During 2007-2008, four cases were carried forward from the previous fiscal year, for a total of four on-going proceedings.

The following table sets out the legislation relevant to potential hearings that the Joint Board[1] was requested to consolidate.

Case Name and Number	***NEPDA*[2]** (Plan Amendment)	***Environmental Protection Act***	***NEPDA*[2]** (Development Permit)	***Planning Act***	***Ontario Planning & Development Act***	***Expropriations Act***
Central Milton Holdings Ltd./665497 Ontario Limited (99-036)	•			•		
Creekbank Developments Limited (05-109)				•	•	
Hamilton General Homes (04-044)	•			•		
Fisher Farms (06-037)			•	•		

[1] For further information, refer to The Tribunal's Mandate on page 2 of this report.
[2] *Niagara Escarpment Planning and Development Act*

Summaries of Decisions and Significant Orders

The following are summaries of all decisions issued this fiscal year, except those cases where the Appellant, Applicant or Proponent withdrew before a Hearing. Summaries of significant orders are also included. All references to the Tribunal's Rules of Practice reflect those provisions that were in place at the time the decision or order was issued.

Consolidated Hearings Act

Central Milton Holdings Limited and 665497 Ontario Limited (Decision)

Central Milton Holdings Limited and 665497 Ontario Limited ("Applicants") filed for a Hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act.* The Applicants sought amendments to the Region of Halton Official Plan (the "Regional Plan") and the Niagara Escarpment Plan ("NEP") that would change the designation of approximately 63 hectares of land from Rural to Urban Area in the Town of Milton. Three public authorities, the Niagara Escarpment ("NEC"), the Region of Halton and the Town of Milton (the "Public Authorities"), opposed the proposed plan amendments.

As a preliminary issue, the Joint Board considered whether the Divisional Court decision of *The Niagara Escarpment Commission v. Paletta International Corporation et al.*, [2007] O.J. No. 3308 ("*Paletta*"), was relevant to the applications. The Joint Board stated that *Paletta* stood for the proposition that section 24(3) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") requires that a proponent must obtain a development permit from the NEC before it may receive any further approval. The Joint Board distinguished *Paletta* from the applications before it, and found that while section 24(3) of the *NEPDA* applied to applications for approvals, consents and permits of various kinds, it did not apply to applications for plan amendments. The Joint Board found that the Applicants were not, therefore, required to seek a development permit from the NEC prior to seeking amendments to the NEP and the Regional Plan.

The Joint Board considered whether the Detailed Concept Plan (the "DCP") submitted by the Applicants provided sufficient scenic walkways and access to the Niagara Escarpment. The Joint Board found that despite creating some interruption in the scenic walkway and allowing only indirect access in some places, the DCP furthered the objective of providing adequate public access to the Niagara Escarpment, as set out in section 8(f) of the *NEPDA*.

The decisive issue before the Joint Board was whether the DCP furthered the purpose of maintaining the "open landscape character of the Niagara Escarpment", as set out in both the "Objectives" section of the NEP, and in section 8(d) of the *NEPDA*. The DCP proposed the construction of 264 units, including 45 townhouses and 219 single detached dwellings, with a density of 5.11 units per net acre. The Joint Board found that the unit density set out in the DCP was significantly higher than the density on nearby Niagara Escarpment lands, and, therefore, the proposed development would not maintain the open landscape character of the Niagara Escarpment.

The Joint Board noted that economic considerations could not be a driving factor in making planning decisions, and emphasized that this was especially so in protected areas such as the Niagara Escarpment.

The Joint Board denied the applications, and dismissed the motions for costs filed by the Public Authorities and by Central Milton.

Decision released: October 17, 2007 (Case No.: 99-036)

Re County of Simcoe Landfill Site (Decision)

Stephen Ogden ("Applicant") submitted an application to the Chairs of the Environmental Review Tribunal and the Ontario Municipal Board (the "Establishing Authority") to re-establish a Joint Board pursuant to section 12(2) of the *Consolidated Hearings Act* ("*CHA*"). He sought clarification of Condition 25 of the "County of Simcoe Landfill Conditions of Approval" ("CofA") set out in the Joint Board Decision, issued by Robert E. Eisen, Q.C. on February 1, 1996. The CofA related to the construction, operation and maintenance of a sanitary landfill site located in the Town of Tiny, County of Simcoe, Ontario.

The main issue was whether the Establishing Authority should grant the application for the re-establishment of the Joint Board pursuant to section 12(2) of the *CHA*. There were also two sub-issues. These were whether section 12(2) of the *CHA* permitted the re-establishment of a Joint Board, and whether the matters identified by the Applicant were proper subjects for "clarification" under section 12(2) of the *CHA*.

The Establishing Authority found that section 12(2) of the *CHA* clearly required that if a Joint Board were re-established, it would have to be the same Joint Board that made the original Decision. Since the Joint Board that issued the original Decision had consisted of a single member, and that member was deceased, the original Joint Board could not be re-established. Since it was not possible to re-establish the original Joint Board, and section 12(2) did not permit the establishment of a new Joint Board, the relief sought by the Applicant was unavailable to him under the *CHA*.

The Establishing Authority also considered the Applicant's suggestion that the former Counsel to the Joint Board at the time of the original Hearing could assist a new Joint Board, established for the purpose of clarifying the CofA under section 12(3) of the *CHA*. The Establishing Authority found that this suggestion was unacceptable for two reasons. The first was that section 12(2) and the limitations it imposed on the re-establishment of a Joint Board applied to the application; not section 12(3). The second was that even if it had been possible to establish a new Joint Board, the use of the Joint Board's former Counsel, who was now Counsel for the Ministry of the Environment, would raise both a conflict of interest and a reasonable apprehension of bias.

In relation to the second sub-issue, the Establishing Authority found that the matters put forward in the application were not proper subjects for clarification under section 12(2) of the *CHA*. The Establishing Authority found that these matters were fundamentally concerned with determining the

extent to which the Community Monitoring Committee (the "CMC"), established by the County of Simcoe pursuant to the CofA, could operate independently of the County. The Joint Board found that the CofA was silent on the question of the independence of the CMC, and that whether the County established the CMC with more or less operational independence was a matter relating to how the County implemented the CofA; not a matter arising out of an ambiguity in the wording of the CofA. Further, the Establishing Authority found that the CofA contained clear authority directing the Applicant and the County to engage in a dispute resolution mechanism that had not been used. In the result, the Establishing Authority dismissed the application.

Decision released: November 26, 2007 (Case No.: CH-87-03)

Re Creekbank Developments Limited (Decision)

Creekbank Developments Limited ("Proponent") filed for a Hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act*, regarding its proposal to build a nine storey apartment building consisting of 207 units in the Town of Oakville. The Joint Board held a Settlement Hearing in which the Proponent provided the Joint Board with a settlement proposal (the "Proposal"). The Proposal indicated that the Proponent had agreed to restrict the size of the building to a maximum of three storeys, containing a maximum of 95 units. All Parties, which included the Corporation of the Town of Oakville ("Town"), the Regional Municipality of Halton, Halton Region Conservation Authority, and People of West Oakville Residents, advised the Joint Board that they agreed with the Proposal.

The Proposal included a Parkway Belt West Plan amendment. The Town submitted suggestions for an official plan amendment and zoning by-law that would facilitate the amendments required by the Proposal. The Joint Board noted that the staff of the Ministry of Municipal Affairs and Housing had been involved in setting the final wording of the Town's suggestions in support of the Proposal. The Joint Board considered the comprehensive and uncontradicted opinion of the Proponent's planner, and found that it supported the conclusion that the Proposal constituted good land-use planning, satisfied the applicable Provincial Policy Statement, and was in the public interest.

The Joint Board also found that pursuant to sections 6 and 7 of the *Ontario Planning and Development Act, 1994*, it had the jurisdiction to approve the amendment to the Parkway Belt West Plan as set out in the Proposal. This amendment removed the tableland portion of the lands at 2362 Upper Middle Road from the Parkway Belt West Plan. The Joint Board also allowed the Town to amend the Official Plan of the Town of Oakville Planning Area, pursuant to sections 22(11) and 17(50) of the *Planning Act*. Finally, the Joint Board allowed the Town to amend the Town of Oakville's Comprehensive Zoning By-law pursuant to section 34(26) of the *Planning Act*.

Decision released: December 18, 2007 (Case No.: 05-109)

Re Hamilton General Homes (1971) Ltd. (Decision)

Hamilton General Homes (1971) Ltd. ("Applicant") filed for a Hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act* ("*CHA*"). The Applicant sought an

amendment (the "Amendment") to the Niagara Escarpment Plan ("NEP") and to the Stoney Creek Official Plan (the "SCOP") that would allow it to subdivide a portion of its 9.2 ha (23 acre) parcel of property into 17 lots, and extend Peach Tree Road. The amendment to the NEP would change the designation of the land from "Escarpment Protection Area" ("EPA") to Minor Urban Centre ("MUC"). The Amendment to the SCOP would expand the urban boundary and change the designation of the subject lands from "Agricultural" to "Winona Urban Community." The Niagara Escarpment Commission opposed the Amendment, as did the Ministry of Municipal Affairs and Housing, the Ministry of Agriculture, Food and Rural Affairs, and Hamilton Conservation.

The property lay within the NEP, though it was outside the Area of Development Control. The property had been used previously for agriculture but at the time of the application, it contained a mixture of plants and trees undergoing natural succession.

The Joint Board considered three broad issues.

The first issue was whether the proposed Amendment met the objectives and purpose of the NEP and the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), which the Joint Board noted, were nearly identical. The Joint Board found that the proposed Amendment failed to satisfy the amendment criteria set out in section 1.2.1 of the NEP and in section 8 of the *NEPDA*. The Joint Board stated that the importance placed on preserving landscapes in the purposes and objectives of the NEP and *NEPDA*, focused not only on preserving views of landscapes, but on "preserving landscapes and rural and natural features as important values in and of themselves." The Joint Board found that subdividing the property into 17 lots would significantly reduce the property's open landscape character, and negatively impact the continuous natural environment of the Niagara Escarpment and the lands in its vicinity. The Joint Board found that the Applicant had not provided a convincing rationale for why the Joint Board should depart from the overlapping purpose of the *NEPDA* and the NEP.

The Joint Board also considered whether the proposed Amendment met designation-specific criteria of the NEP. The Applicants argued that under the Amendment, a portion of the subject property would retain the designation "buffer", and thereby further the objective of Part 1.4 of the NEP. The Joint Board found that the current size of the buffer should not be reduced and rejected the Applicant's approach as one that attempted to discount the impact the development would have on the open landscape character of the property.

The Joint Board also considered whether the proposed re-designation of the property from EPA to MUC would support the fourth objective in Part 1.4 of the NEP, i.e., the encouragement of agriculture, forestry and recreation. The Joint Board found that the development of residential lots on the property would preclude agricultural uses or the maintenance of the property's natural characteristics. These effects detracted from the Development and Growth Objectives contained in section 12 of Part 1.6 of the NEP, and failed to meet the Development Criteria in section 2.10 of Part 2. The Joint Board therefore refused the re-designation.

The Joint Board remarked that the Applicant's proposed development had the potential to detract from several of the provisions of the 1997 Provincial Policy Statement, and thereby offend section 2.1 of the NEP. The Joint Board found that since the proposal clashed with the general purposes of the NEP and the *NEPDA*, the Joint Board did not need to make a final determination with respect to section 2.1 of the NEP.

The second broad issue was whether the SCOP should be amended to expand the Winona urban boundary and re-designate the subject lands from "Agricultural" to "Winona Urban Community". The Joint Board noted that the NEP was the senior land use plan for the area, and so the SCOP must conform to it. Since the Joint Board had found that the NEP required the property to be designated as EPA, it also found that the proposed Amendment to the SCOP must fail.

The Joint Board found that there was no need to address a third issue regarding the density of the development, because it had rejected the proposed Amendments to the NEP and SCOP.

The Joint Board dismissed the Application.

Decision released: July 16, 2007 (Case No.: 04-044)

Re Peter A. Fisher (Decision)

Peter A. Fisher ("Applicant") applied for a Hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act* ("*CHA*"), regarding a decision of the Niagara Escarpment Commission ("NEC") to deny his applications for two Development Permits (the "Development Permit Applications"). He also appealed a decision of the Committee of Adjustment of the City of Burlington, denying his application for consent to the proposed parcel severances and lot consolidations (the "Consent Application").

The Joint Board considered two main issues

1. Whether the Development Permit Applications conformed to all applicable planning documents.

2. Whether the Consent Application conformed to all applicable planning documents.

As a preliminary issue, the Joint Board considered whether it was necessary to adjudicate the Consent Application if the Joint Board refused the Development Permit Applications. The Joint Board found that section 24(3) of the *Niagara Escarpment Planning Development Act* ("*NEPDA*"), required it to dispose of the Consent Application even if it refused the Development Permit Applications, however, the only outcome for the Consent Application, in that case, could be refusal. If the Joint Board approved the Development Permit Applications, it would be open to the Joint Board to either approve or refuse the Consent Application.

On the first main issue, the Joint Board agreed with the submissions of the NEC, that all decision-makers acting under section 25 of the *NEPDA* are required to make their decisions in accordance with the Niagara Escarpment Plan ("NEP"). The Joint Board considered whether the Development Permit Applications complied with the New Lots Policy contained in section 1.3. of the NEP. That policy allows for a lot to be severed provided "no new building lot(s) is created". The Joint Board found that the Development Permit Applications, if granted, would reconfigure Blocks 14 and 15 as residential building lots, and would ultimately result in the creation of two new dwellings on these lots. The Joint Board considered whether this result accorded with the purpose of the *NEPDA* and the NEP. It found that interpreting the New Lots Policy in a way that would permit severances of the kind sought by the Appellant could result in the "chipping away of the Escarpment", and might have significant adverse consequences vis-à-vis the intent of the NEP. The Joint Board found that the interpretation of what constitutes a new building lot under the NEP should be consistent with the purpose of the *NEPDA*, which the Joint Board defined as maintaining and enhancing the natural environment and the open landscape character of the Escarpment. The Joint Board found that the Development Permit Applications did not further this purpose, but detracted from it. Though this failure was fatal to the Development Permit Applications, the Joint Board thought it worth noting that the Applications also conflicted with several other objectives and requirements of the NEP, including: Objectives 1 and 4 of the Escarpment Protection Area, Part 2.4 (Lot Creation), and the restrictions placed on severances.

The Joint Board considered the second issue, even though its finding on the preliminary issue had been that the Consent Application must fail once the Joint Board had found that the Development Permit Applications did not conform with the *NEPDA* and the NEP. The Joint Board remarked that the Consent Application's lack of conformity with a pre-existing Subdivision Agreement was a relevant factor, but was not enough on its own to defeat it. More important for the failure of the Consent Application was that the Joint Board found that neither of the Regional or City Official Plans, nor the Provincial Policy Statement, were intended to allow for the type of severances sought by the Appellant. Each of these planning tools was intended to foster agricultural land protection and environmental protection, not residential development resulting from "lot creation". The Joint Board commented that even if it had found the Consent Application furthered the objectives of the various Plans and the Provincial Policy Statement, the Joint Board would have denied it for failing to represent good planning, and for failing to be in the public interest under sections 51(24)(a) and (b) of the *Planning Act*. Finally, the Joint Board found that that the Consent Application failed to conform with the NEP, as required under the *Planning Act*.

The Joint Board dismissed the Application in its entirety.

Decision released: November 2, 2007 (Case No.: 06-037)

Environmental Bill of Rights, 1993

Cushman v. Director, Ministry of the Environment (Decision)

Mike Cushman ("Applicant") filed an application pursuant to section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), for Leave to Appeal the issuance of a Certificate of Property Use ("CPU"). The CPU, issued by the Director, Ministry of the Environment ("MOE"), under section 168.6 of the *Environmental Protection Act* ("*EPA*"), permitted Cytec Canada Inc. ("Cytec") to construct a Community Ice Arena and Recreational Complex with related parking lots on a parcel of property located in the City of Niagara Falls (the "Site"). The previous owner of the Site had been Cyanamid Canada Inc., a manufacturer of fertilizer and plastic resins.

The Tribunal found that the Applicant had standing under section 38(1) of the *EBR*, but denied him Leave to Appeal under section 41, for the reason that he had failed to present convincing evidence that there was good reason to believe that no reasonable person could have made the decision to issue the CPU.

The Applicant put forward several grounds on which the Tribunal might grant Leave to Appeal.

1. The MOE failed to implement adequate testing of the soil, water and air at the Site or off-Site.

The Tribunal found the Applicant had inappropriately focused his submissions on the Risk Assessment connected with the CPU. Section 38 of the *EBR* permits applicants to seek Leave to Appeal Class I or II instruments only, and the Risk Assessment was neither a Class I nor Class II instrument. The Tribunal found, therefore, that the Risk Assessment could not be subject to a Leave to Appeal Application.

Further, the Applicant had not established specifically how the testing conducted at the Site fell short of either what the *EPA* or a healthy environment required. The Tribunal found that the Applicant had not provided the substantial and relevant information base on which the Tribunal could conclude that there was good reason to believe that no reasonable person could have made the decision in question.

2. The MOE failed to provide information in support of its conclusion that soils across the entire site are medium fine texture.

The Tribunal found that the Applicant had failed to provide an adequate information base to support this ground of appeal, while the Director and Cytec had supplied the Tribunal with considerable expert evidence addressing the Applicant's concerns.

3. The Risk Assessment should have used the arsenic value for the most sensitive receptor.

The Tribunal found that the uncontradicted evidence of Cytec's experts was that the soil containing elevated levels of arsenic had been removed from the Site, and that the current levels of arsenic were within regulatory limits.

4. The CPU did not contain a requirement for a Soil Management Plan ("SMP") capable of protecting the workers and the community during the remediation process.

The Tribunal found that the CPU did contain a SMP addressing the Applicant's concerns. The Tribunal noted that it could not, at that stage, determine the adequacy of the SMP. The Tribunal said that in order to meet the test for Leave to Appeal, the Applicant should have submitted evidence challenging the details of the SMP rather than arguing that the CPU did not contain a SMP.

The Tribunal found that each of the Applicant's grounds of appeal failed the first branch of the Leave to Appeal test, and therefore, it was unnecessary to consider second branch of the test under section 41 of the *EBR*.

The Tribunal dismissed the application for Leave to Appeal the Director's decision to issue the CPU.

Decision released: April 10, 2007 (Case.: 06-189)

Dawber v. Director, Ministry of Environment (Decision)

Pursuant to section 38(1) of the *Environmental Bill of Rights, 1993* ("*EBR*"), Diane and Chris Dawber, Hugh and Clair Jenney, Mark Stratford, J.C. Sulzenko, Janelle Tulloch, Sandra Willard, Susan Quinton on behalf of Clean Air Bath, Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, Paul Langloie and John Fay ("Applicants"), filed for Leave to Appeal two Certificates of Approval ("CofAs") issued by two Directors, Ministry of the Environment ("MOE"). The Directors had issued the CofAs to Lafarge Canada Inc. ("Lafarge") under section 9 of the *Environmental Protection Act* ("*EPA*"). The first of the CofAs permitted Lafarge to operate a Portland cement manufacturing facility, and the second – a Provisional Certificate of Approval ("PCA") – permitted Lafarge to operate a waste-disposal site. Both Approvals related to property in Loyalist Township in the County of Lennox and Addington.

The Tribunal first considered whether the Applicants had standing to seek Leave to Appeal. With the exception of the Lake Ontario Waterkeeper ("LOW"), the Applicants were local residents who had filed written comments with the MOE in the proposal stages of Lafarge's applications. The Tribunal found that each Applicant had an interest in the decision within the meaning of section 38 of the *EBR*, and granted them standing.

The main issue before the Tribunal was whether the Applicants met the two-pronged test for Leave to Appeal set out in section 41 of the *EBR*. The Tribunal drew on the explanation of the test set out

in *Simpson v. Ontario (Director, Ministry of Environment)* (2005), 18 C.E.L.R. (3d) 123, and found that the "Applicants must satisfy the section 41 test on a balance of probabilities, but what they must prove to that standard is that *it appears there is good reason to believe* (that no reasonable person could have made the decision) in the first branch, and that *it appears that the decision could result* (in significant harm) in the second branch."

The Tribunal dismissed several applications for failing to support crucial technical facts with expert evidence, and for omitting substantive analysis about why they met the leave test in section 41 of the *EBR*.

The Tribunal found that the successful Applicants met the first branch of the test for three reasons, two of which related to the Statement of Environmental Values for the Ministry of the Environment ("SEV"). The Tribunal stated that where an Applicant could establish that the Director had issued a CofA without regard to the principles set out in the SEV, the first branch of the test might be met.

The Tribunal found that the Directors, despite complying with numerical regulatory standards, had failed to assess the cumulative ecological effects of the CofAs, and therefore had not observed the SEV principle requiring an "ecosystem approach to environmental protection."

The Tribunal found the Directors had failed to observe a second SEV principle: the "precautionary principle." The Tribunal interpreted that principle to require that where there is scientific uncertainty about the possible adverse effects of an activity, the activity should be considered as hazardous as it possibly can be. The Tribunal noted that the MOE, in its Notice of Proposal for Regulations regarding the incineration of tires, indicated that it was uncertain about the adverse effects of tire burning. The Tribunal found that the precautionary principle required the Directors, therefore, to consider the adverse effects of tire incineration to be as hazardous as they possibly could be. It further placed upon the Directors the onus of establishing the absence of environmental harm.

The Tribunal found the Directors had failed to consider how the common law rights of landowners in the area might be affected by its decision to issue the CofA. The Tribunal noted that statutory enactments are paramount to the common law, but found that a reasonable decision would consider the rights of landowners in order to determine whether the detrimental effects upon those rights were appropriate and necessary, and in the interests of environmental protection.

The Tribunal found the Applicants had established that there was good reason to believe that no reasonable person, having regard to the principles of the SEV and the common law rights of landowners, could have made the decisions on which the issuance of the CofA depended. Thus, the Applicants had discharged the burden of section 41(a).

The Tribunal found the only relevant consideration under the second branch of the Leave to Appeal test was evidence of the possible environmental effects of a Director's decision. The MOE argued that the effects of the CofAs would fall within the range permitted by the relevant Ontario Regulations. The Tribunal found that the MOE regulations did not take into account cumulative

effects, total ecosystem loading, synergistic effects, bioaccumulation or complete standards for high priority contaminants. Further, the information supporting the CofAs did not include baseline information for air and water quality. The successful Applicants offered evidence from a number of experts indicating the hazardous nature of the emissions Lafarge would generate through the use of traditional and waste-derived fuel. The Tribunal concluded that the Applicants had provided sufficient information to establish that the Directors' decision to issue the CofAs could result in significant harm to the environment. The Applicants had therefore met the requirements of the second part of the test.

The Tribunal granted Leave to Appeal to Susan Quinton on behalf of Clean Air Bath; Martin Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition; LOW and Gordon Downie; and Gordon Sinclair, Robert Baker, Gordon Downie, Paul Langlois and John Fay.

Under Rule 50 of its Rules of Practice, the Tribunal allowed the successful Applicants to appeal the Directors' decisions in their entirety.

Lafarge filed an application with the Divisional Court for Judicial Review of the Tribunal's Decision to grant Leave to Appeal. The Divisional Court heard the application on the 9th, 10th, and 15th of April, 2008, and had not issued its decision at the time this Annual Report was completed.

Decision released: April 4, 2007 (Case Nos.: 06-160 to 06-181/06-183)

Marshall v. Director, Ministry of the Environment (Decision)

Alan Marshall ("Applicant") filed a Leave to Appeal application under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), with respect to a decision of the Director, Ministry of the Environment ("MOE"), under section 53 of the *Ontario Water Resources Act* ("*OWRA*"). The decision was to issue a Certificate of Approval (the "CofA") to Chemtura Canada Co./Cie ("Chemtura") for an industrial sewage works in the town of Elmira, Regional Municipality of Waterloo (the "Site"). The ultimate goal of the CofA was to bring the Elmira municipal aquifer up to Ontario drinking water quality standards by the year 2028. The Tribunal found, and the Director and Chemtura did not dispute, that the Applicant had standing to bring a Leave to Appeal application under section 38 of the *EBR*.

The issue before the Tribunal was whether the Applicant met the test for Leave to Appeal in section 41 of the *EBR*. The Tribunal considered eight Grounds of appeal, and found that only one met the first part of the Leave to Appeal test.

The first ground of appeal rejected by the Tribunal was the Applicant's argument that the CofA did not comply with the 1991 Amending Order by removing the legal requirement for containment. The Tribunal found that the portion of the CofA which permitted some loss of containment in the core contaminated area had the effect of maximizing the operations of the on-site and off-site groundwater treatment systems. Further, this portion of the CofA implemented what had been authorized by an Amending Order issued in 2000. Accordingly, the Tribunal found that the Director's decision permitting some loss of containment was reasonable.

The second ground of appeal was that the CofA's criteria for determining hydraulic containment were inadequate and inappropriate because they did not specify pumping rates for the on-site wells. The Tribunal found that in the process of raising this Ground of appeal, the Applicant had merely put forward an alternative approach to setting pumping rates, without putting forward any evidence that the criteria used by the Director to determine hydraulic containment in the CofA were deficient.

The third ground of appeal was that the well locations and well pairings in the CofA were inappropriate for measuring and maintaining containment. The Tribunal found that the evidence put forward to date supported the Applicant's allegation that the monitoring well data might be jeopardized by the proximity of the monitoring wells to the pumping wells. The Tribunal accepted this Ground of appeal as satisfying the first branch of the Leave to Appeal test set out in section 41 of the *EBR*.

The fourth ground of appeal was that the CofA would remove all possibility of ever restoring the Elmira aquifer(s) to Ontario drinking water standards. The Tribunal found that the evidence indicated that the Director had not abandoned the goal of restoring water quality by 2028 since the "Reasons for Conditions" included in the CofA made it clear that the purpose of the CofA was to "achieve the goal of meeting Ontario Drinking Water Standards."

The Tribunal rejected the Applicant's fifth ground of appeal, which was that the pumping rate in one of the wells during construction of the Ammonia Treatments System (the "ATS") was too low. The Tribunal found that the provisions of the CofA relating to the pre-testing of the ATS, and the CofA's flexible and frequent approach to monitoring the rate of hydraulic containment, indicated that this Ground of appeal did not satisfy the requirements of the first part of the Leave to Appeal test.

The sixth ground of appeal was that the CofA violated an agreement between the MOE, Chemtura and the Chemtura Public Advisory Committee (the "CPAC"), to implement the Aquifer Remediation Optimization-Guiding Principle (the "Guiding Principles") developed jointly by the CPAC, Chemtura and the MOE. The Tribunal found that there was no evidence of an agreement that the CofA would implement the Guiding Principles exactly as they had been proposed by CPAC. Further, the Tribunal found that the relevant conditions in the CofA appeared to track closely the Guiding Principles and did not diverge in any significant respect. The Tribunal rejected this Ground of appeal.

With regard to the seventh Ground of appeal, the Tribunal found that the MOE had provided a high level of meaningful public consultation by allowing CPAC to comment on various aspects of the CofA, and by conducting meetings with CPAC and the Regional Municipality of Waterloo. As evidence that the consultation was meaningful, the Tribunal cited the fact that the CofA included several provisions implementing the Guiding Principles originally drafted by CPAC. The Tribunal commented that meaningful consultation did not require that the Parties agree.

The Applicant's final Ground of appeal was that the CofA provided Chemtura with an incentive to pump more contaminated water off-site than on-site. The Appellant argued that this violated the polluter pays principle. The Tribunal found that while the CofA's compliance with the polluter

pays principle was a relevant consideration, the Applicant had not provided the Tribunal with any evidence as to the magnitude of the projected costs that could be shifted from Chemtura onto the public as a result of the Director's decision to issue the CofA. Further, the Appellant had not referred to any relevant government policies or otherwise tied this Ground to the Leave to Appeal test. The Tribunal rejected this Ground of appeal.

Under the second part of the Leave to Appeal test, the Tribunal found that with respect to Ground 3, it did not appear that the Director's well-pairing decision could result in significant harm to the environment. More generally, the Tribunal found that the new pumping and monitoring wells required by the CofA, the additional monitoring criteria, the reassessment of the monitoring and treatment strategies, and evidence that contaminated groundwater migrating off-site would move slowly, allowing effective monitoring and reaction time, all indicated that the CofA did not create the risk of substantial harm to the environment. Further, the Tribunal commented that the CofA as a whole was the culmination of previous Certificates of Approval and many years of study.

The Tribunal dismissed the Leave to Appeal application.

Decision released: March 4, 2008 (Case No.: 07-096)

Passmore on behalf of the North Aldershot Preservation Association v. Director, Ministry of Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), Alex Passmore and Dave Welch ("Applicants") filed for Leave to Appeal the issuance of a Certificate of Approval (Air) ("CofA"). The CofA was for the operation of a crematorium at the Bayview Cemetery and Crematory in the City of Burlington, Ontario.

The issue before the Tribunal was whether the Applicants had met the deadline for filing an application for Leave to Appeal under section 40 of the *EBR*, and if not, whether their failure to do so was the result of officially induced error.

The Tribunal found that the Applicants had not established the requirements for officially induced error, and dismissed their application for Leave to Appeal on the basis that it had been filed outside the 15-day period prescribed by section 40 of the *EBR*.

Decision released: May 15, 2007 (Case No.: 06-225)

Rapski v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), John and Eileen Rapski ("Applicants") applied for Leave to Appeal a Director's decision not to issue a proposed Director's Order (the "Draft Order") that had been posted on the Environmental Registry pursuant to section 22(1) of the *EBR*. The Draft Order, made pursuant to section 34(7) of the *Ontario Water Resources Act* ("*OWRA*"), would have required Marcel Guilbeault to hire a qualified consultant to propose

measures to re-establish a water supply to an affected well on the property owned by the Applicants, and located at 230 Grenfell Road, in the District of Temiskaming, Ontario. The Draft Order had been issued following a complaint by Mr. Rapski that excavation work done by Mr. Guilbeault on a stream located along the boundary of their respective properties had caused Mr. Rapski's well to dry up.

The issue before the Tribunal was whether it had the jurisdiction to consider the Applicants' Leave to Appeal application under the *EBR*. The Tribunal found that the Applicants did not meet the two-part test for standing under section 38(1) of the *EBR*. The Tribunal noted that the Applicants met the first part of the test since they had an undisputed interest in the Director's decision – they were adjoining neighbours to Mr. Guilbeault and had been responsible for a Ministry of Environment investigation of the stream diversion which interfered with their well water supply. The Tribunal found that the Applicants did not, however, meet the second part of the test, which requires that a person seeking Leave to Appeal must show that "another person has a right under another Act to appeal from a decision whether or not to implement the proposal." The Tribunal found that since no reviewable decision had been made, no one had a right to appeal under any Act, including the *Safe Drinking Water Act*, or the *OWRA*, as suggested by the Applicants. The Tribunal also found that it did not have the authority to grant the Applicants standing on the basis of Equity, since it was bound by the words of section 38(1) of the *EBR*.

Decision released: January 28, 2008 (Case No.: 07-120/07-121)

Spellman v. Director, Ministry of the Environment (Decision)

On July 5, 2007, the Director, Ministry of the Environment ("MOE"), issued a Permit to Take Water (the "PTTW") to the Creekside Hunt and Fishing Club (the "Hunt Club"). The PTTW allowed the Hunt Club to take water from Big Creek, and the Big Creek Impoundment, provided the takings accorded with an Operations Plan that included an appropriate wetland management approach. On July 20, 2007, Dr. John Spellman ("Applicant") applied under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), for Leave to Appeal the Director's decision to issue the PTTW.

1. Part 1 of the Section 41 Leave to Appeal Test

The Tribunal noted that under the test for Leave to Appeal in section 41 of the *EBR*, the Tribunal was not required to resolve the scientific differences between the Applicant, the Hunt Club and the MOE. These differences centered on the relative merits of the natural marsh management approach supported by the Applicant, and the managed marsh management approach contained in the PTTW's Operation Plan. The Tribunal commented also that it was not required to determine whether the Structural Marsh Management approach adopted by the PTTW was unequivocally the best approach for the Big Creek Wetland. The question before the Tribunal was whether it appeared that there was a good reason to believe that no reasonable person, having regard for the *Ontario Water Resources Act* ("*OWRA*"), the Water Taking Regulation, the PTTW Manual, and the MOE's Statement of Environmental Values, could have decided to approve the Hunt Club's pumping operations as regulated by the Operations Plan.

The Tribunal found that the Operations Plan incorporated by the PTTW was the culmination of a scientific study and analysis of the Big Creek Wetland conducted in consultation with the public, the MOE, the Minister of Natural Resources, the Federal Department of Fisheries, and most notably for the Tribunal, the Essex Region Conservation Authority. The Tribunal found that the Operations Plan applied a science-based ecosystem approach that had been implemented successfully in Ontario to sustain other Great Lake coastal wetlands. Considered together, these factors led the Tribunal to find that the Director and the Hunt Club had clearly demonstrated a reasonable basis for the Director's decision.

The Tribunal found also that the Director had provided a rational basis for choosing a five-year term for the PTTW, and for putting in place monitoring requirements mandating annual assessments of the wetland habitat indicators.

The Applicant submitted that the Director had failed to exercise a precautionary approach in approving the PTTW. The Tribunal found that the precautionary approach required the Director to take appropriate measures to prevent environmental harm where some degree of uncertainty indicated that harm might occur. It did not require the Tribunal to refuse an application for a PTTW simply because risks of environmental harm had been raised. The Tribunal found that the Director had weighed the possible threats facing the Big Creek Wetland and incorporated appropriate measures into the PTTW in a way that was consistent with the precautionary principle.

The Applicant argued that the Director had failed to consider the effects of the PTTW on human health under section 2(1)(c) of the *EBR*, and under section 4(2) of the Water Taking Regulation. The Applicant also argued that the Director had failed to consider the interest of other persons in a way that would ensure fair sharing of water resources as required by the *OWRA* and the Water Taking Regulation. On both issues, the Tribunal found that the evidence provided by the Applicant did not create a substantial and relevant information base as required by the test for Leave to Appeal under section 41 of the *EBR*.

Accordingly, the Tribunal found that none of the grounds advanced by the Applicant satisfied the first branch of the Leave to Appeal test.

2. Part 2 of the Leave to Appeal test

The Tribunal briefly considered the second part of the test, and found that the Applicant had not established that the Director's decision could result in significant harm to the environment. In particular, the Tribunal noted that the wetlands of the Essex Region were no longer naturally self-sustaining, but required human intervention. The potential harm that could result from a draw-down under the terms of the PTTW could also result from natural wetland dry-wet cycles, and could not be characterized as harm resulting solely from the decision to approve the PTTW.

3. Request for Costs

The Tribunal refused the Hunt Club's request for costs under section 17.1 of the *Statutory Powers*

Procedure Act. The Tribunal found that the Hunt Club had not established that the Applicant had acted unreasonably or in bad faith, or that his submissions were frivolous or vexatious.

The Tribunal dismissed the application for Leave to Appeal, and denied the Hunt Club's request for costs.

Decision released: November 27, 2007 (Case No.: 07-051)

Environmental Protection Act

1446751 Ontario Inc. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), 1446751 Ontario Inc. ("Appellant") appealed an Order issued by the Director, Ministry of the Environment under section 157.3 of the *EPA*. The Order related to the depositing of wood waste and grinding operations at the Rosa Flora Limited site located at Part Lot 12, Concession 2C, in the County of Haldimand.

Subsequent to a Preliminary Hearing, the Director revoked the parts of the Order pertaining to the appeal, and the Appellant made a request to the Tribunal to withdraw its appeal. The Tribunal considered the revocation and request for withdrawal under Rule 182 of the Tribunal's Rules of Practice. The Tribunal found that the Director had revoked the decision under appeal because the relevant legislation had changed, and that the approval cited in the Order was no longer required for the Appellant's grinding operations to take place on the Rosa Flora site. The Tribunal found that it was clearly in the public interest that a Director's Order not remain in effect when it no longer had any legal foundation. The Tribunal noted that the only other Party to this matter, the Appellant, supported the revocation. Pursuant to Rule 182, the Tribunal accepted the Director's revocation and dismissed the Appeal.

Decision released: May 31, 2007 (Case No.: 06-115)

1512179 Ontario Ltd. o/a Top Notch Restaurant and Motel v. Director, Ministry of the Environment (Decision)

On December 20, 2007, the Tribunal received a Notice of Appeal filed by Alicja Suwala-Andziak ("Appellant") of a Director's Order (the "Order") issued under section 157.3 of the *Environmental Protection Act* ("EPA"). The Order required 1512179 Ontario Ltd. (operating as Top Notch Restaurant and Motel) ("Top Notch") to carry out work in relation to a septic tank and tile bed, and to retain a consultant for the assessment of the subsurface disposal sewage works located at Part Lot 1, Concession 21, Georgian Bluffs, County of Grey (the "Site"). The Order had been issued by the Director on November 29, 2007.

The issue before the Tribunal was whether the Appellant had filed her Notice of Appeal within the statutory deadline of 15 days after the service of the Order, and if not, whether the Tribunal had any jurisdiction to extend the time to file the Notice of Appeal.

The Tribunal found that section 141 of the *EPA* left the Tribunal with no jurisdiction to process a Notice of Appeal filed outside the 15-day time limit except where service of the order or decision in question did not give the person notice.

The Tribunal found that the Order had been served on the Appellant on November 29, 2007. This meant that when the Appellant filed her Notice of Appeal on December 20, 2007, it was six days after the 15-day time period allowed by section 140 of the *EPA*. The Appellant raised the question of whether the 15 days referred to in section 140 denoted "business days" or "calendar days". The Tribunal found that Rule 15 of the Tribunal's Rules of Practice clearly indicates that the calculation of a period of time includes holidays and days on which the Tribunal office is closed, except where the period of time expires on a holiday, or on a day the Tribunal office is closed. The Tribunal found that section 89 of the *Legislation Act, 2006* (and its predecessor, section 28(h) of the *Interpretation Act, 1990)* supported this method of calculating statutory time periods. The Tribunal found that since the fifteenth day after the Appellant received Notice of the Order was not a holiday, there was no reason to extend the time limit. The Tribunal commented that if the Legislature had intended to exclude Saturdays, Sundays and holidays from the calculation of time under section 140 of the *EPA*, it could have done so explicitly, as it had under section 156.4 of the *EPA*.

With respect to the second issue of whether the Tribunal had any jurisdiction to extend the time period set out in section 140, the Tribunal found that the Appellant's circumstances did not meet the criteria set out in section 141 of the *EPA*. The Tribunal found that there was no evidence to suggest that the Appellant had not received notice of the Order. The Tribunal found that the Appellant knew that the Director planned to issue an Order, and was also aware of the nature of its contents prior to it being actually issued, because she had requested and attended a review of the Provincial Officer's Order that formed the basis of the Director's Order. Further, the Tribunal found that the Provincial Officer's personal notes and the Certificate of Service executed by him formed conclusive evidence that the Appellant had received notice of the Order on November 29, 2007. For these reasons, the Tribunal found that the Appellant did not fall within the exception set out in section 141 of the *EPA*, and that, therefore, the Tribunal had no jurisdiction to grant her an extension. The Tribunal dismissed the appeal.

Decision released: February 15, 2008 (Case No.: 07-119)

1543850 Ontario Inc. v. Director, Ministry of the Environment (Order)

In this Order, the Tribunal considered whether to grant the Town of Whitby ("Town") Party status in relation to the appeal of a Director's Order (the "Order") by 1543850 Ontario Inc. ("Appellant"). The Order under appeal required the Appellant to ensure that no additional ash would be deposited at 4600 Thickson Road North, in Whitby, Ontario (the "Site"), and to give a copy of the Order to every person acquiring an interest in the Site. The Order also required the Appellant to register a Certificate of Requirement and to notify the Director when the Certificate had been registered.

At the Preliminary Hearing held November 9, 2007, the major issue was whether the Town should be granted Party status. Counsel for the Ministry of the Environment ("MOE") did not oppose the Town's request, however, Counsel for the Appellant did. The Tribunal found that the Town's request touched on all three of the factors set out in Rule 54 of the Tribunal's Rules of Practice. The Town's involvement in another proceeding regarding the same Site, and its status as the local municipality meant that it had both a substantial, and a genuine public interest in the proceeding under Rules 54(a) and 54(b). The fact that the Town had commissioned an engineering study to analyze the ash meant that the Town was likely to make a relevant contribution to the Tribunal's understanding of the issues under Rule 54(c). Further, the Tribunal found that it should exercise its discretion to grant Party status to the Town because doing so would further two of the purposes set out in Rule 1 of the Tribunal's Rules, namely, enhancing access and assisting the Tribunal in fulfilling its statutory mandate.

The Tribunal ordered that the Town of Whitby be granted Party status.

Order released: November 15, 2007 (Case No.: 07-081)

A.B.P. Recycling Inc. v. Director, Ministry of the Environment (Decision)

A.B.P. Recycling Inc. ("A.B.P.") appealed a Provincial Officer's Order, later confirmed by a Ministry of the Environment ("MOE") Director's Order (the "Order)". The Order required A.B.P. to submit a Certificate of Approval ("CofA") to operate a waste management site to the MOE's Environmental Assessment and Approvals Branch. The Tribunal granted a stay of the Order on June 15, 2006. The Tribunal held a Preliminary Hearing on October 10, 2006, and granted Presenter status to Burke Austin on behalf of Community Action Parkdale East. The Tribunal ordered that the sole issue for the Hearing would be whether used-food cooking oil materials referred to in the Provincial Officer's Order were "waste" within the meaning of Part V of the *EPA*.

On May 25, 2007, A.B.P. proposed to withdraw from the appeal. Shortly afterward, the Director revoked the Order that was the subject of the appeal, and Counsel for the Director wrote to the Tribunal consenting to A.B.P.'s withdrawal. Burke Austin did not provide submissions on the withdrawal of the appeal.

Pursuant to Rule 182 of the Tribunal's Rules of Practice, the Tribunal found that the withdrawal of the appeal was consistent with the purpose and provisions of the *EPA*, and was in the public interest.

Decision released: June 25, 2007 (Case No.: 06-007)

Baker v. Directors, Ministry of the Environment (Order)

Further background to this Order is set out in the summary of *Dawber v. Director, Ministry of Environment*, released April 4, 2006 (Case No.: 06-160 to 06-181/06-183), above.

On April 4, 2007, the Tribunal granted several Parties ("Appellants") Leave to Appeal two Certificates of Approval ("CofAs"), issued by two different Directors of the Ministry of the Environment ("MOE") to Lafarge Canada Inc. ("Lafarge") under section 9 of the *Environmental Protection Act* ("*EPA*"). The first of the CofAs related to air emissions, and permitted Lafarge to operate a Portland cement manufacturing facility. The second of the CofAs permitted Lafarge to operate a waste-disposal site. Both Approvals related to property in Loyalist Township in the County of Lennox and Addington (the "Site").

At the continuation of the Preliminary Hearing, the Parties requested that the Tribunal make several procedural orders.

In response to the Appellants' first request, the Tribunal refused to order the MOE to produce and make available to the public a complete record of materials relating to Lafarge's applications for the CofAs. The Tribunal found that the definition of "Public Record" in Rule 3 of the Tribunal's Rules of Practice (the "Rules") was broad enough to provide the general public with sufficient access to the relevant materials in the proceeding. The Tribunal Secretary had secured an agreement with the Municipality of the Township of Loyalist (the "Municipality") to allow the Tribunal to maintain a copy of the Public Record at the Municipality's offices. This copy of the Public Record would be made available to the public for consultation.

In response to the Appellants' second request, the Tribunal found that paragraph 13(b) of the Tribunal's Practice Direction respecting Technical and Opinion Evidence (the "Practice Direction") supported the granting of an Order requiring at least one meeting of the Parties' consultants in an effort to resolve issues, shorten the Hearing, and save time and expense. The Tribunal refused to grant an Order directing that Site visits be arranged for the Parties' consultants. The Tribunal found that its Order directing the Parties' consultants to meet pursuant to paragraph 13(b) of the Practice Direction, provided for a site visit if it would assist the consultants to obtain more complete information.

The Tribunal also refused to grant the Appellants' request for a general Order for interrogatories under Rule 158. It found that Rule 158 required the Appellants to provide the Tribunal with particulars respecting who would be questioned, as well as the nature of the issues to be addressed to the individual. The Tribunal instructed the Parties that they could exchange interrogatories for specific witnesses or Parties on specific issues, provided these were on consent. The Tribunal informed the Parties that it would consider further requests for interrogatories after the Parties' consultants had met.

The Tribunal denied the Directors' request for an Order directing the Appellants to select one representative to cross-examine witnesses at the main Hearing. The Tribunal found that a Party's right to cross-examine a witness who gives evidence at a hearing was one of the rules of natural justice and procedural fairness, enshrined in the *Statutory Powers Procedure Act*. The Tribunal found that this right could not be displaced simply because some Parties may have shared common positions on the issues to be determined.

The Tribunal also considered the Directors' request for an Order that documents filed with the Tribunal in advance of the main Hearing pursuant to Rule 153, be excluded from the Public Record even though none of the Parties had filed a motion for confidentiality under Rule 191. Based on the reasoning applied in *General Chemical Industrial Products Inc. v. Director, Ministry of the Environment* (2007) C.E.L.R. (3d) 224, the Tribunal denied the Directors' request. The Tribunal found that the intent of the Rules was for the Tribunal to disclose all information that was filed with the Tribunal unless there was an application to make it confidential, and that since no such application had been made, the documents formed part of the Public Record.

The final issue considered by the Tribunal was whether the issues to be addressed in the main Hearing should be restricted to the specific grounds accepted by the Tribunal in its Leave to Appeal Decision. The Tribunal distinguished its role and jurisdiction when granting Leave to Appeal pursuant to section 41 of the *Environmental Bill of Rights, 1993* from its role and jurisdiction in hearing an appeal of a Director's decision after Leave to Appeal had been granted. Citing the fact that it was not possible to appeal a Leave to Appeal decision, the Tribunal found that it had no jurisdiction to determine whether the Leave to Appeal decision contained errors, including whether its scope was too broad. The Tribunal commented that the proper way to challenge the correctness of a Leave to Appeal decision was through judicial review. Additionally, the Tribunal found that the Leave to Appeal decision had made it clear that the Applicants could "appeal the [Directors'] decisions in their entirety", and so the issues to be addressed in the main Hearing were not restricted to those five out of seven grounds specifically considered and accepted in the Leave to Appeal Decision.

Order Released: November 20, 2007 (Case Nos.: 07-009 to 07-016)

Baker v. Director, Ministry of the Environment (Order)

Further background to this Order is set out in the summary by the same name located immediately above. This was an Order of the Environmental Review Tribunal (the "Tribunal") dealing with a Motion by Lafarge Canada Inc. ("Lafarge") to adjourn the main Hearing in the matter of an appeal of two Certificates of Approval ("CofAs"), issued to Lafarge by the Director, Ministry of the Environment ("MOE"). The Tribunal's Order also dealt with the list of issues that had been submitted by the Parties in preparation for the main Hearing.

With regard to the issues list, the Tribunal considered the more detailed list proposed by the Appellants in light of several objections submitted by Lafarge and the Director.

The first objection was that some of the issues proposed by the Appellants related to a ground that had not been accepted by the Tribunal in support of the Appellants' Leave to Appeal application. The Tribunal noted that it had already considered and rejected this line of argument in its Order of November 20, 2007.

The second objection was that the Appellants had included issues that were not related to a ground listed in their Notice of Appeal. The Tribunal found that the grounds in the Notices of Appeal were sufficiently broad to allow consideration of all of the issues proposed by the Appellants.

The third objection was that some of the issues proposed by the Appellants related to matters that the Director had no jurisdiction to consider while evaluating Lafarge's applications for the CofAs, so that these issues were outside the Tribunal's jurisdiction in the appeal proceeding. More specifically, Lafarge and the Director argued that several of the issues improperly challenged the validity of a Regulation, while the Appellants maintained that they were seeking to make the case that under the relevant legislative provisions, policies, and guidelines, the Director was authorized to include requirements in the CofAs that were more stringent than those required by the Regulation. The Tribunal found that the Appellants had raised an arguable issue, and that it should be left for determination at the main Hearing.

The Tribunal also found that it was arguable that Lafarge's record of environmental performance was relevant to the Director's decision to grant the two CofAs, and that this issue, as raised by the Appellants, should be determined at the main Hearing.

Lastly, the Tribunal found that the issue of whether the CofA related only to the receipt and storage of waste alternative fuels prior to combustion (as Lafarge and the Director asserted), or whether it also regulated the disposal of end product waste from combustion (as the Appellants asserted), was also an arguable issue that was best addressed at the main Hearing.

The fourth objection raised by Lafarge and the Director was that some of the issues proposed by the Appellants were too vague. The Tribunal found that in their response to this objection, the Appellants had provided sufficient explanation to clarify any points in question, and that accordingly, the issues were not too vague.

Overall, the Tribunal found that none of the proposed issues submitted by the Parties should be excluded. The Tribunal set out the issues list in an Appendix, and reworded these where necessary in order to reflect the Director's concerns that the issues should form neutral questions to be addressed by the Panel at the main Hearing.

The context for the Motion to Adjourn was that Lafarge had filed an application for judicial review of the Tribunal's earlier Decision granting the Appellants Leave to Appeal the issuance of the CofAs to Lafarge (see the summary of *Dawber v. Director, Ministry of the Environment* located above). Lafarge was now seeking to adjourn the main Hearing in the appeal until the Divisional Court had disposed of the judicial review application.

In determining whether to grant the Motion to Adjourn, the Tribunal stated that its task was to weigh various individual considerations to determine whether an adjournment would foster the integrity and efficiency of the Tribunal's process, as outlined in Rules 95 and 96 of the Tribunal's Rules of Practice. The Tribunal found that while the five-month delay that would result from the proposed adjournment was not insignificant, the importance of the judicial review proceeding for the adjudicative process before the Tribunal meant that the delay was not inordinate. The Tribunal found also that Lafarge had first submitted its request for an adjournment early in the proceeding, so that it was not responsible for unreasonably delaying the Hearing. The Tribunal found that it had not received any evidence that a further delay of five months would exacerbate the challenges

already faced by the Appellants. Further, the Tribunal found that there was insufficient evidence to establish that the proposed adjournment would cause or contribute to any existing risk of environmental harm, since the operation of the two CofAs had already been stayed. With regard to the Appellants' submission that an adjournment would create the risk of fragmenting the Tribunal's process, the Tribunal found that in this case, where the Divisional Court's decision could potentially require a re-hearing of the Appeal in part or in whole, failing to adjourn created an even greater risk of fragmentation.

In summary, the Tribunal granted Lafarge's request for an adjournment, and ordered that the Hearing be commenced in September 2008. The Tribunal also set out a list of issues that would be addressed in the main Hearing.

Order Released: January 7, 2008 (Case Nos.: 07-009 to 07-016)

Dow AgroSciences Canada Inc. Director, Ministry of the Environment (Decision)

Dow AgroSciences Canada Inc. and Procyk Farms ("Appellants") appealed Order Number 0354-73AKEC-1 (the "Order") issued by the Director, Ministry of the Environment ("MOE") under section 157.3 of the *Environmental Protection Act* ("*EPA*"). The Order required the Appellants to do various things, including remediation and monitoring in relation to groundwater and soil contamination resulting from a leak in a pesticide storage tank owned by Dow AgroSciences Inc., and located on a farm owned by Procyk Farms in Windham, County of Norfolk (the "Site"). Both Appellants requested a stay and an interim stay of the Order.

The issue before the Tribunal was whether to grant the requested interim stay of the Order until the Appellants' Motions for a stay could be heard and a decision rendered by the Tribunal. Pursuant to Rule 101(a) of the Tribunal's Rules of Practice (the "Rules"), the Tribunal first considered whether section 143 of the *EPA* precluded the granting of the interim stay. Then the Tribunal applied the three-part test for a stay or interim stay found in Rule 101(b)(c) and (d).

On the question of whether the granting of an interim stay of the Order could result in serious risk of impairment to the environment, the Tribunal noted that approximately nine months had passed between the date the MOE became aware of the facts that led it to issue the Order, and the date it actually issued the Order. The Tribunal also noted that the MOE had known the results of sampling done in relation to a residential well located on the Site since the end of November 2007, and that if there had been evidence of serious danger, impairment or risk, that information would have been brought to the immediate attention of the Parties and the Tribunal. The Tribunal found that the lack of evidence indicating that an interim stay would result in danger to the environment meant that section 143(3) of the *EPA* did not deprive the Tribunal of jurisdiction to grant the interim stay.

When applying the three-part test for a stay or interim stay found in Rule 101(b)(c) and (d), the Tribunal commented that the test was based on the analysis required in a motion for an interlocutory injunction set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS)Ltd.*, [1987] 1 S.C.R. 110, and in *RJR-MacDonald Ltd. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The Tribunal commented that based on its earlier

decisions, the test for an interim stay had a lower threshold than the test for a stay due to the fact that there was usually a shorter period of time between the hearing and an interim stay motion, than between the hearing and the disposition of a stay motion.

The Tribunal found that the Appellants met the first part of the test by establishing that there was a serious issue to be decided. The Tribunal found that there appeared to be a real dispute over the need for additional study of the Site, and with regard to recommendations contained in the 2006 Plume Report and relied upon by the Director.

With regard to the second part of the test and the question of whether the Appellants would suffer irreparable harm if the interim stay were not granted, the Tribunal found that there was some evidence of irreparable harm to Procyk Farms, but very little with respect to Dow AgroSciences Ltd. More importantly, however, the Tribunal found that since there was no evidence that the interim stay would cause harm to the environment, the balance of convenience favoured the granting of the interim stay. Accordingly, the Tribunal granted an interim stay of the Order.

Order released: January 16, 2008 (Case Nos.: 07-067/07-068)

Friends Sweets & Tandoori Restaurant v. The Corporation of the City of Brampton (Decision)

Pursuant to section 100.1(1) of the *Environmental Protection Act* ("*EPA*"), the Finance Department of the City of Brampton ("City") issued an Order to Pay Costs against Friends Sweet & Tandoori Restaurant, Kulwant Dukhi and AAA Holdings ("Appellants"). The Appellants were ordered to pay $31,178.50 to the City for the costs it incurred while cleaning up a spill of cooking oil and grease which had been discharged into a storm water drain, and had eventually flowed into an open storm water ditch in Northhampton Park in the City of Brampton. The Appellants filed a Notice of Appeal pursuant to section 110.1(7) of the *EPA*. Kulwant Dukhi and 1183227 Ontario Inc. filed two Notices of Allegation, with one addressed to 1411200 Ontario Ltd. ("Novelty Sweets"), and the other addressed to Inzola Construction Inc. and/or Prosize Plumbing. After a Preliminary Hearing, the Environmental Review Tribunal (the "Tribunal") granted Party status to Novelty Sweets and Jagtar Bains.

The Parties entered mediation conducted by a Vice Chair of the Tribunal, and reached an agreement, recorded in Minutes of Settlement (the "Settlement Agreement") whereby the City would receive a total of $16,000 (paid in equal shares by all the other Parties) in exchange for granting a full and final release of any further claims. Pursuant to Rule 146 of the Tribunal's Rules of Practice, the Tribunal reviewed the Settlement Agreement and determined that it was consistent with the purpose and provisions of the relevant legislation and was in the public interest. Specifically, the Tribunal found that the terms of the Settlement Agreement were consistent with the purpose of section 100.1 of the *EPA*, which was to provide a municipality with a summary remedy to obtain payment of its costs where a pollutant had been spilled.

The Tribunal accepted the Settlement Agreement and dismissed the appeals.

Decision released: October 26, 2007 (Case Nos.: 06-134 to 06-137)

General Chemical Industrial Products Inc. v. Director, Ministry of Environment (Order)

This was an appeal under section 140 of the *Environmental Protection Act* ("*EPA*"), by General Chemical Industrial Products Inc., General Chemical Canada Holding Inc., De Lyle W. Bloomquist, H. Scott Ellis, Eugene I. Davis, David Graziosi, Derek L. Rogers, Bliss A White and Jillian Swartz ("Appellants"). They appealed two Orders issued by the Director, Ministry of the Environment, under sections 17, 43 and 196 of the *EPA*. The Orders related to a soda ash settling basin waste disposal site located at the General Chemical Plant Facility in the Town of Ahmerstburg (the "Site"). Order #1 required the company to put in place site security, to carry out an interim monitoring plan, and to develop a comprehensive monitoring plan. Order #2 required the company to conduct a study regarding waste at the Site.

On May 1, 2007, the Tribunal received a request for Party status from Loris Collavino, a nearby property owner. On May 4, 2007, Roberta Pennington, a reporter with the Windsor Star, requested access to the Tribunal's Public Record of the proceeding.

At the Preliminary Hearing the Tribunal considered two issues:

1. Whether Loris Collavino should be granted Party status in the proceeding.
2. Whether Ms. Pennington should be granted access to the Tribunal's Public Record of the proceeding.

With regard to the first issue, the Tribunal noted that an applicant for Party status did not need to satisfy each criterion set out in Rule 53 of the Tribunal's Rules of Practice ("Rules"). The Tribunal also noted that it retains the discretion to add parties to a proceeding after it has considered all relevant matters.

The Tribunal found that the Hearing would not affect Mr. Collavino directly and substantially and that he lacked a genuine interest in the subject matter of the Appeal. Mr. Collavino's interest in the selection of the most suitable closure plan for the Site was extraneous to the Appeal, since the Appeal dealt with the issue of who was liable to carry out the Director's Orders, and not with the issue of what those Orders should require. Further, the Tribunal found that Mr. Collavino was not likely to make a relevant contribution to the liability issues raised by the Appeal. Accordingly, the Tribunal denied Mr. Collavino Party status, but it granted him Participant status.

With regard to the second issue, the Tribunal found that although the documents requested by Ms. Pennington had not been introduced into evidence by the Parties as Exhibits, Ms. Pennington should be granted access to them under Rules 3, 190 and 191. The Tribunal found that the intent of the Rules was that the Tribunal would disclose all information and documents filed with it, except where a Party filed an application to make them confidential under Rule 191.

The Tribunal advised the Parties that unless one or more of them brought a Motion for to make the documents confidential under Rule 191 by June 12, 2007, all documents filed in the matter would be made available to the public on June 13, 2007.

Order released: June 8, 2007 (Case No.: 05-122 to 05-130)

General Chemical Industrial Products Inc. v. Director, Ministry of the Environment (Order)

The background to this Order is set out in the summary by the same name, dated June 8, 2007, located directly above.

In response to the Tribunal's Order of June 8, 2007, General Chemical Industrial Products Inc., General Chemical Canada Holding Inc., De Lyle W. Bloomquist, H. Scott Ellis, Eugene I. Davis, David Graziosi, Derek L. Rogers, Bliss A White and Jillian Swartz ("Appellants"), brought a motion to have all or some of the documents contained in the Document Books filed with the Tribunal marked confidential under Rule 191 [now Rule 203] of the Tribunal's Rules of Practice (the "Rules"). The Appellants also sought an Order that the Hearing of the Motion be closed to the public. Shortly thereafter, the Director, Ministry of the Environment ("MOE") filed its submissions in support of the Appellants' position. The Town of Amherstburg (the "Town") opposed the Motion.

The Tribunal considered two broad issues:

1. Whether all of the Document Books filed by all of the Parties should be marked "confidential" and not form part of the Public Record pursuant to Rule 203

2. Whether all of the witness statements filed by all of the Parties, should be marked "confidential" and not form part of the Public Record pursuant to Rule 203.

Under the first broad issue the Tribunal considered whether the Appellants could request that documents produced or owned by General Chemical Canada Ltd. ("GCCL"), a bankrupt company, be marked confidential. The Tribunal noted that the Parties had not referred to any case law or authorities in their submissions relating to this sub-issue. The Tribunal found that documents relating to a bankrupt company could be marked confidential if they met the criteria set out in Rule 203. The Tribunal found also that Rule 203 was silent as to who can bring a Motion, and that it could be inferred that any Party can make a request to have any document marked as confidential, irrespective of who filed the document, so long as the moving Party satisfies the relevant criteria.

The Tribunal next defined the relevant criteria to be met on a Motion under Rule 203. The Appellants suggested that the Tribunal look for guidance to the practices of other Ontario tribunals, particularly the Ontario Energy Board (the "OEB"), and from the test set out in section 17(1) of the *Freedom of Information and Personal Privacy Act* ("*FIPPA*"). The Tribunal reviewed the OEB's Practice Direction on Confidential Filings. It also discussed several sections of *FIPPA*, as well as section 9 of the *Statutory Powers Procedure Act* ("*SPPA*"), and stated that it would be guided by those statutes and the jurisprudence that interprets them, as well as by its own Rules. The Tribunal found that the general principle was that all documents filed with the Tribunal form part of the Public Record unless a Motion is successfully brought under Rule 203, and that the onus was on the person requesting confidentiality.

The Tribunal found that the basic test to be applied where a Motion under Rule 203 concerns third party information is: "whether there is significant prejudice to the competitive position or negotiating or contractual relations of any person or organization arising from the disclosure of the documents in question, such that it is appropriate to remove those documents from the Public Record." The Tribunal drew on several decisions of the Information and Privacy Commissioner (the "IPC") and concluded that an entity claiming confidentiality must present evidence that is "detailed and convincing", and must describe a set of facts and circumstances which would lead to a "reasonable expectation that harm would occur if the information is released." The Tribunal warned that generalized assertions concerning the consequences of what might happen will not satisfy the test. The Tribunal emphasized that exemptions to disclosure must be specific and limited, so that a Party claiming confidentiality should be prepared to indicate what it is about each document, or each type of document, that satisfies the test.

The Tribunal then considered the Appellants' submissions in light of the test. The Appellant submitted that each of the documents for which it claimed confidentiality fell within one of five categories: (i) private board minutes, (ii) confidential agreements with third parties, (iii) technical reports by various consultants, (iv) internal corporate documents, and (v) confidential documents. The Tribunal dealt with the Appellants' submissions as follows:

(i) Drawing on a decision of the IPC, the Tribunal commented that "private board minutes" do not automatically qualify as confidential commercial information. They must be accompanied by supporting evidence that indicates what it is about each document that meets the criteria of confidentiality. The Tribunal found the private board minutes in Tabs 81- 83, as well as Tabs 98 and 100-102 met the test, while those in Tabs 76-80 and 84-85 did not.

(ii-iii) With regard to the "confidential agreements" and the "technical reports", the Tribunal found that none of these documents satisfied the criteria for confidentiality. Several of the confidential agreements were already in the public domain through a related bankruptcy proceeding, and the others contained insufficient information, or were accompanied by insufficient evidence, to warrant being made confidential. The Tribunal found that the Appellants had failed to bring forward any specific evidence establishing that the disclosure of the technical reports would cause significant prejudice to the competitive position of the Appellants or to third parties.

(iv) With regard to the "internal corporate documents" and the Director's Document Books, the Tribunal found that the Appellants had failed to submit any detailed or specific evidence establishing that the disclosure of these documents would cause significant prejudice to the competitive position of the Appellants or third parties. The Tribunal found that on their face, however, several of these documents contained commercial and production data that might prejudice the Appellants' ongoing commercial business. The Tribunal, therefore, ordered these to be marked as confidential.

(v) With regard to the "confidential corporate documents", the Tribunal found that most of these documents did not meet the criteria for confidentiality because the Appellants had not presented evidence as to how their disclosure would result in significant prejudice to the competitive position

of any person or organization. The Tribunal found that several documents containing lawyers' communications met the criteria, as did several documents containing detailed financial data.

On the second broad issue of whether all of the witness statements should be marked confidential, the Tribunal applied the same criteria. It found that the Appellants had not submitted any evidence that the disclosure of the witness statements would cause significant prejudice to the competitive or negotiating interests of any person or organization, and accordingly, refused to mark them as confidential.

The Tribunal granted the Motion under Rule 203, in part.

Order released: December 24, 2007 (Case Nos.: 05-122 to 05-130)

General Chemical Industrial Products Inc. v. Director, Ministry of the Environment (Order)

General Chemical Canada Ltd. ("GCCL"), a bankrupt company, appealed an Amending Order issued by the Director, Ministry of the Environment ("MOE") under section 17, 18, 43 and 196 of the *Environmental Protection Act* ("*EPA*"). The terms of the Amending Order related to earlier Orders issued by the Director requiring GCCL and other Orderees to undertake remediation of various environmental conditions with respect to an industrial chemical manufacturing plant located in the Town of Amherstburg (the "Site"). The Amending Order required GCCL to do three things: the first was to provide the Director with a Financial Assurance of $12,600,000; the second was to give a copy of the Amending Order to each person acquiring an interest in the Site; and the third was to register a Certificate of Requirement on title by January 18, 2008. PricewaterhouseCoopers Inc., acting as Interim Receiver for GCCL, filed a Motion for a stay with respect to each of the requirements of the Amending Order.

The issue before the Tribunal was whether to grant a stay of the Amending Order.

The Tribunal considered the Motion under section 143 of the *EPA,* Rules 99 through 101 of the Tribunal's Rules of Practice (the "Rules"), and was guided by the Supreme Court of Canada's decision respecting interim relief, *RJR-MacDonald Inc. v. Canada* [1994] 1 S.C.R. 311.

The Tribunal found that it had the jurisdiction to issue a stay under section 143 of the *EPA* because doing so would not pose a risk to human health or the environment. The Tribunal found that the Amending Order dealt with financial assurance and registering a notice on title rather than remediation. It acknowledged, however, that in some cases, terms such as those found in the Amending Order could deprive the Tribunal of its jurisdiction to issue a stay under section 143.

With regard to the first part of the test for the granting of a stay under Rule 101, the Tribunal found that GCCL had raised a serious issue to be decided by the Tribunal. The Tribunal found that the appeal raised a number of significant issues, particularly the interface of environmental remediation requirements and the *Bankruptcy and Insolvency Act*. The issues of which assets were available for the financial assurance, how much money could be directed to a financial assurance, and the impact

of the proposed sale of a parcel of the lands at the Site, qualified as "serious" issues under the low threshold set by the first branch of the test.

Under the second part of the test, the Tribunal found that GCCL had not established that it would suffer irreparable harm if it were required to comply with the terms of the Amending Order. The Tribunal found that being required to provide financial assurance to the MOE would not prejudice the bankrupt company's secured creditors. The Amending Order required only that the money be set aside and did not allow the MOE to spend it. The manner in which GCCL's assets would be distributed was ultimately a question for the Court to decide. The Tribunal found also that requiring GCCL to register a Notice on title would not cause irreparable harm to GCCL because the undisclosed prospective buyer had already received a copy of the Amending Order, and was aware of possible encumbrances on the property.

Despite having concluded that the Motion for a stay failed to pass the second step of the test, the Tribunal considered the application of the third step. It found that the balance of convenience favoured not granting the stay. The Tribunal found that the public interest was a significant factor in weighing the balance of convenience, and that in this case, the public interest would be severely affected, if not defeated, if adequate resources were not available for remediation. Accordingly, the Tribunal refused GCCL's request for a stay.

Order released: March 10, 2008 (Case No.: 07-122)

Inter-Recycling Systems Inc. v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Inter-Recycling Systems Inc. and Michele Giampaolo ("Appellants") appealed an Order of the Director, Ministry of the Environment ("MOE"), confirming a Provincial Officer's Order requiring the Appellants to do work, provide written reports, and implement Performance Monitoring regarding a solid non-hazardous landfill site in Sarnia Ontario (the "Site").

Debra Krukowski requested Party status for herself on behalf of the Inter-Recycling Landfill Liason Committee (the "I-RLLC"), an unincorporated association. She also requested that the Tribunal give Notice of the Preliminary Hearing and Hearing to all nearby residents within the "interest area" as defined by the Site's Certificate of Approval. Doing so would involve providing notice to persons located within an area larger than that required by Rule 27 of the Tribunal's Rules of Practice (the "Rules").

Neither the Appellants nor the MOE objected to Ms. Krukowski's requests for Party status and additional Notice. The Tribunal found that the request for Party status met the criteria set out in Rule 54, and that it was appropriate to provide the additional Notice sought by Ms. Krukowski.

The Tribunal ordered that Ms. Krukoski, on behalf of I-RLLC, be granted Party status, and that the Notice of Preliminary Hearing and the main Hearing be extended to those residents living within the "interest area."

Order released: December 17, 2007 (Case Nos.: 07-098/07-099)

Inter-Recycling Systems Inc. v. Director, Ministry of the Environment (Decision)

Inter-Recycling Systems Inc. and its President and sole corporate officer, Michele Giampaolo ("Appellants") appealed an Order of the Director, Ministry of the Environment ("MOE"), requiring the Appellants to do work, provide written reports, and implement Performance Monitoring regarding a solid non-hazardous landfill operation at 1620 Blackwell Road in Sarnia (the "Site").

Inter-Recycling Systems Inc. operated a landfill at the Site under a Provisional Certificate of Approval issued in 1981, and then under an Amended Certificate of Approval granted on June 14, 2004. On June 17, 2004, the *Adams Mine Lake Act* (the "*AMLA*"), was proclaimed and prohibited the deposit of waste into a "lake," a defined term. In December of 2004, the MOE requested that the Appellants either resubmit a Design and Operations Plan and bring their landfill into compliance with the *AMLA*, or prepare and submit a Closure Plan for the Site. On October 10, 2007, a Provincial Officer issued an Order to the Appellants, confirmed by a Director's Order on October 24, 2007. The Appellants appealed the Director's Order and filed a Motion for a stay of the Order. The Director filed a Motion to Dismiss the appeal.

The issue before the Tribunal was whether to grant the Director's Motion to Dismiss pursuant to Rule 102 of the Tribunal's Rules of Practice. The Tribunal found that in making a decision regarding a Motion to Dismiss, it would assess whether the nature and quality of the evidence advanced by the Appellant supported a "genuine issue" requiring a Hearing, or whether the appeal was so doubtful that it did not deserve consideration by the Tribunal in a Hearing.

The Tribunal found that the Appellant's Ground of Appeal alleging that the Director's Order was unreasonable did not raise a genuine issue requiring a hearing. The Tribunal interpreted the Appellants' argument to be that it was unreasonable for the Director's Order to require a clean-up of part of the Site, while the Provincial Government prevented the Appellants from generating the revenues required for the clean-up by enacting the *ALMA*. The Appellants conceded that the *ALMA* applied to the Site. The Tribunal found that according to section 145.2 of the *Environmental Protection Act*, the Tribunal "may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal consider the Director should take in accordance with this Act and the regulations...." The Tribunal found that it could not, however, question the appropriateness of a provincial law. Since both Parties agreed remediation of the Site was necessary, and since there was no challenge to the substantive requirements of the Director's Order, the Tribunal found that this Ground of Appeal did not raise a genuine issue requiring a Hearing.

With regard to the Appellants' Ground of appeal alleging that the Director's Order was unfair, the Tribunal found it was being asked to undertake a review of the implications and appropriateness of the *AMLA* with respect to the Site. The Tribunal found that these issues, as well as whether the Appellants should be compensated for the effects of the *ALMA*, and whether there should be further negotiations between the MOE and the Appellants with respect to the new statutory provisions, were issues beyond the Director's mandate, and, therefore, beyond the jurisdiction of the Tribunal.

The Tribunal also rejected the Appellants' argument that the MOE had "assumed management and control" of the Site when the Director issued the Order, and that according to section 157.1 of the *EPA*, the Director could have issued the Order to the MOE. The Tribunal found that it was not unfair that the Order did not include the two previous owners of the Site since section 157.1 of the *EPA* restricted the Director to issuing Orders to either the current owners or those in management or control of the property. In addition, there was no evidence that the Appellants had attempted to persuade the MOE to take action against the previous owners during the period it was engaged in developing a Remediation Action Plan. The Tribunal commented that even if the former owners ought to have been included in the Director's Order, the joint and several liability imposed by the Order made the Appellants liable for carrying out the entire Order, and that it had been open to the Appellants to issue a Notice of Allegation under Rules 75 and 76 of the Tribunal's Rules.

In summary, the Tribunal found that there was no genuine issue requiring a Hearing and granted the Motion to dismiss the appeal.

Decision released: February 29, 2008 (Case Nos.: 07-098/07-099)

Lavoie on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca, and Ottawa Landfill Watch v. Director, Ministry of Environment (Decision)

Under section 139 of the *Environmental Protection Act* ("*EPA*"), several Appellants challenged an Amended Certificate of Approval ("Amended CofA") issued by the Director, Ministry of the Environment ("MOE") to Waste Management of Canada Corporation ("Waste Management") pursuant to section 9 of the *EPA*. The Amended CofA allowed Waste Management to operate an enclosed flare system, a landfill gas-to-energy facility, and a soil bioremediation process at Waste Management's Ottawa Landfill. The Tribunal's Decision granting the Appellants Leave to Appeal under section 41 of the *Environmental Bill of Rights, 1993* ("*EBR*"), was *Bogan v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 12. That Decision had automatically stayed the Director's Decision to issue the Amended CofA, however, on March 3, 2007, the Tribunal Ordered a partial lifting of the stay until the disposition of the appeal. The appeal was limited primarily to issues relating to odour and benzene emissions.

After the Preliminary Hearing, the Parties engaged in mediation discussions and entered into a draft Settlement Agreement. Under Rule 181 of the Tribunal's Rules of Practice (the "Rules"), the Tribunal considered whether the proposed draft Settlement Agreement was consistent with the purpose and provisions of the relevant legislation, and whether it was in the public interest having regard to the interests of the Participants and Presenters. The relevant legislation in this case was the *EPA* and the *EBR*, as well as the MOE's Statement of Environmental Values prepared under the *EBR*.

The Tribunal found there was no evidence suggesting the draft Settlement Agreement was contrary to Rule 181. The Tribunal found additionally that by furthering the protection of the environment, the draft Settlement Agreement advanced a key objective of both the *EPA* and the *EBR*. Accordingly, the Tribunal found that the draft Settlement Agreement should be accepted.

Since the language of the draft Settlement Agreement had not been finalized, the Tribunal made several procedural Orders under which the Director would complete the Settlement Agreement and circulate it to all the Parties, Participants and Presenters, whereupon the signatories would indicate their agreement or disagreement to the Tribunal. If not all the signatories agreed with terms of the Settlement Agreement, the Tribunal would schedule a Hearing to resolve any outstanding matters. If the signatories agreed with the terms of the Amended CofA and the Tribunal accepted the proposed changes, then the Tribunal would dismiss the appeal and order the Director to issue the revised Amended CofA to Waste Management.

Decision released: October 26, 2007 (Case Nos.: 06-201 to 06-210)

Lavoie on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDumpt.ca, and Ottawa Landfill Watch v. Director, Ministry of the Environment (Decision)

Further background to this Decision is contained in the summary of the Order by the same name located above. On October 26, 2007, the Tribunal issued an Order concerning a proposed settlement reached by the Parties following successful mediation. In that Order, the Tribunal provisionally accepted the settlement under Rule 181 (now Rule 193) of the Tribunal's Rules of Practice, pending the drafting of the necessary changes to the Amended Certificate of Approval (Air) ("Amended CofA") issued under section 9 of the *Environmental Protection Act*. Subsequent to that Order, the Parties provided the Tribunal with proposed changes to the Amended CofA.

The issue before the Tribunal was whether the proposed changes to the Amended CofA reflected the settlement agreement reached by the Parties and whether the proposed settlement and changes to the Amended CofA were consistent with the purpose and provisions of the relevant legislation and were in the public interest, having regard to the interests of the Participants and Presenters, in conformity with Rule 193 of the Tribunal's Rules of Practice.

Based on information provided to the Tribunal during the teleconference of February 14, 2008, the Tribunal found that the proposed changes to the Amended CofA reflected the settlement agreement reached by the Parties, and satisfied the requirements of Rule 193 of the Tribunal's Rules of Practice.

Decision released: February 22, 2008 (Case Nos.: 06-201 to 06-210)

Limoges v. Director, Ministry of Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Mitech Plastics Corporation, Pop & Lock Corporation, Brian D. Mitchell and Richard G. Limoges, ("Appellants") appealed an Order issued by the Director, Ministry of Environment, under sections 18 and 196(1) of the *EPA*. The Order required the Appellants to undertake certain remedial measures with respect to contaminated soil and groundwater at a site in Welland, Ontario.

The Tribunal held a teleconference in which Counsel for the Appellants and the Director agreed to revised conditions that would be incorporated into the Director's Order if approved by the Tribunal.

The Tribunal considered the Appellants' request to withdraw their appeal under Rule 181 of the Tribunal's Rules of Practice. The Tribunal found that the proposed withdrawal and revised conditions were consistent with the purposes and relevant provisions of the *EPA*, and were in the public interest. The Tribunal amended the Director's Order to reflect the agreement between the Parties, and dismissed the appeal.

Decision released: July 6, 2007 (Case Nos.: 06-152 to 06-155)

Maple Leaf Foods Inc. v. Director, Ministry of Environment (Decision)

Maple Leaf Foods Inc. ("Maple Leaf") filed a Notice of Appeal pursuant section 140 of the *Environmental Protection Act* ("*EPA*"), challenging an Order made by the Director, Ministry of Environment ("MOE"), under section 157.3(5) of the *EPA*. The Order required Maple Leaf to remove sludge from Lagoon 2 at its facility located in the City of Hamilton.

Over the course of the Hearing, Maple Leaf produced evidence that the sludge in question did not contain sulphates. Based on an analysis of the evidence conducted by the MOE's expert, the Director concluded that the material that was the subject of the Director's Order did not need to be removed from Lagoon 2. Thereafter, the Parties reached a Settlement Agreement setting out the terms upon which the Director's Order would be revoked. The Tribunal accepted the Settlement Agreement under Rule 182 of its Rules of Practice, as being consistent with the purpose and provisions of the *EPA*, and as being in the public interest. Accordingly, the Tribunal dismissed the appeal.

Decision released: June 27, 2007 (Case No.: 06-182)

Angelo Menegotto v. Director, Ministry of the Environment (Decision)

Angelo Menegotto ("Appellant") filed a Notice of Appeal pursuant to section 140 of the *Environmental Protection Act*, challenging Provincial Officer's Order PO1780813 (the "Order") on April 5, 2002. The Order dealt with the contamination of a bedrock aquifer and required the Appellant to carry out certain remedial activity on his property located at 535-537 Woolwich Street, Guelph Ontario.

On December 9, 2005, the Parties entered into a Settlement Agreement. On July 6, 2007, after the Appellant complied with the terms of the Settlement Agreement, the Director, Ministry of the Environment, revoked the Order. The Tribunal reviewed the Settlement Agreement and the terms on which the Order was revoked in accordance with Rule 182 of the Tribunal's Rules of Practice and Practice Direction. Thereafter the Tribunal granted the Appellant's request to withdraw from the appeal and dismissed the appeal.

Decision released: August 20, 2007 (Case No.: 02-013)

Region of Huronia Environmental Services Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act*, Region of Huronia Environmental Services Ltd. ("Appellant") appealed a decision of the Director, Ministry of the Environment, to refuse to issue the Appellant a Certificate of Approval ("CofA") for an Organic Soil Condition Site (the "Site"). The Director refused the application because the proposed Site was located within a topographical area containing many slopes of greater than 9%, contravening the *Guidelines for the Utilization of Biosolids on Agricultural Land.* The Parties wrote to the Tribunal indicating that they had resolved the matter. The Appellant sought permission to withdraw its appeal.

The Tribunal accepted the Appellant's request to withdraw and dismissed the appeal.

Decision released: August 28, 2007 (Case No.: 07-050)

Shouldice Designer Stone Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the Environmental Protection Act ("*EPA*"), Steve Shouldice and Shouldice Designer Stone Ltd. (the "Appellants"), appealed an Order issued by the Director, Ministry of the Environment. The Order, issued pursuant to section 157.3 of the *EPA*, required the Appellants to apply for a Certificate of Approval – Industrial Sewage retain consultants to determine the extent of any contamination to ground and surface water, and submit a report to the Ministry of the Environment.

The Parties advised the Tribunal that they had reached a settlement that would result in an amendment to the Order and the withdrawal of the appeal. The Tribunal found that the Settlement Agreement was consistent with the purpose and provisions of the *EPA* and was in the public interest. The Tribunal dismissed the appeal and accepted the Settlement Agreement under Rule 181 of Tribunal's Rules of Practice.

Decision released: April 5, 2007 (Case No.: 06-214/06-215)

Sobczak v. Director, Ministry of Environment (Decision)

Under section 140 of the *Environmental Protection Act* ("*EPA*"), Lawrence Sobczak, ("Appellant") a Trustee of the Estate of Mary Sobczak, filed a Notice of Appeal of Order Number 0868-6Q4NJD-1 (the "Order"). The Order had been issued by the Director, Minister of the Environment under section 157.3 of the *EPA*. The Director made the Order on February 9, 2007, and the Appellant filed the Notice of Appeal on April 16, 2007.

The Tribunal considered two issues:

1. Whether the Appellant filed the Notice of Appeal within the statutory deadline of 15 days after the service of the Director's Order.

The Tribunal found that while it was unclear exactly when the Appellant received service of the Director's Order, it was reasonable to assume that it occurred sometime in mid-February. The Appellant did not dispute receiving the Order. The 15-day appeal period dictated by section 140 of the *EPA* would have expired March 15, 2007. The Appellant did not file a Notice of Appeal until April 16, 2007, making it late by four weeks.

2. Whether the Tribunal has any jurisdiction to extend the time to file the Notice of Appeal.

The Tribunal stated that the onus is on a prospective appellant to establish why the 15-day time limit should not apply, or why the matter falls within the exception provided in section 141 of the *EPA*. The Tribunal found that the Appellant's explanation that he was on holidays when the Notice was issued, and that he had been delayed while awaiting feedback from third parties, was insufficient.

The Tribunal dismissed the Appeal.

Decision released: May 15, 2007 (Case No.: 07-008)

Starnino Holdings Limited v. Director, Ministry of Environment (Order)

Starnino Holdings Limited ("Starnino") appealed an Order of the Director, Ministry of Environment ("MOE"), pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"). The Order, issued under section 150 of the *EPA* required the Appellant to pay $972,250.19 in costs for expenses incurred by the MOE in carrying out waste removal at a waste disposal site at 10525 Keele Street, (the "Site") in the City of Vaughan, Regional Municipality of York, Ontario. The Director brought a motion to dismiss Starnino's appeal of the Costs Order.

The Tribunal considered two broad issues and several sub-issues.

The first broad issue centered on section 145.3(2)(a) of the *EPA* and whether the Tribunal had the jurisdiction to find that the Costs Order did not relate to a thing Starnino was required to do under the *EPA*.

The Tribunal cited *National Hard Chrome Plating Co. v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 10, at para 10, and agreed that the purpose of section 145 of the *EPA* "is not to allow the applicant to question the initial order against it." The Tribunal rejected Starnino's argument that the Director had improperly named it as an Orderee in the initial clean-up Order. The Tribunal stated that whether Starnino was a legitimate Orderee was an issue Starnino ought to have raised in an appeal of the initial clean-up Order, and not in a later challenge of the ensuing Costs Order.

The second broad issue was whether Starnino provided sufficient evidence that there was a genuine issue requiring a Hearing to determine whether the amount Starnino was required to pay was unreasonable and excessive.

In its Amended Notice of Appeal, Starnino had included a Proposed Cleanup Plan prepared by Trow Associates. The Proposed Cleanup Plan included a detailed cost assessment and a comparison of its estimate to the costs incurred by the MOE. Starnino also filed a letter from Waste Excellence Corporation ("WEC"), a receiver on the subject property, who conducted the clean-up between December 17, 2004 and January 26, 2005. That letter contained a comparison of the costs that could be expected in the Site clean-up by following the WEC approach as opposed to the approach used by Integrated Municipal Services, the corporation hired by the MOE to clean up the Site between November 29, and December 17, 2004. The Tribunal found that Starnino's evidence indicated a discrepancy in the cost of removing the excess material from the Site, and that the evidence contained sufficient detail to support the basis of its argument that the Costs Order was for an unreasonable amount.

The Tribunal did not accept Starnino's argument that it was unfair and unreasonable for the MOE to assess the full cost of the clean up against Starnino, and that other Orderees should share the costs. The Tribunal found that section 150(5) of the *EPA* allowed multiple Orderees to be held jointly and severally liable for clean-up costs.

The Tribunal ordered the Hearing to continue solely with respect to the issue of whether the clean-up costs were unreasonable having regard to the work that was done.

Order released: June 22, 2007 (Case No.: 05-153)

Starnino Holdings Limited v. Director, Ministry of Environment (Order)

Further background to this matter is set out in the summary by the same name, dated June 22, 2007, and located above.

In its June 22, 2007 Order, the Tribunal had defined the sole issue for the Hearing as the quantum of the Costs Order issued by the Director, Ministry of the Environment, against Starnino Holdings Limited ("Starnino"). Subsequently, Starnino served a Notice of Application to the Divisional Court for Judicial Review of the Tribunal's June 22, 2007 Order (Div. Ct. File No. 343/07). Thereafter, Starnino sought to adjourn the proceedings before the Tribunal pending the outcome of its judicial review application before the Divisional Court.

The Tribunal considered whether it should grant the adjournment requested by Starnino.

The Tribunal stated that every request for adjournment must be judged on its own merits. With regard to the application before it, the Tribunal found that proceeding with the Hearing on the single issue of quantum would not affect the ability of the Parties to receive a full and fair hearing. The Tribunal stated that if the Divisional Court found that the Tribunal ought to hear evidence on additional matters, the Tribunal would reconvene to do so.

Additionally, the Tribunal found that an adjournment would not foster the integrity and efficiency of the Tribunal's processes. It was not the case that proceeding with the Hearing would potentially result in duplication of evidence if Starnino's judicial review application were successful.

The Tribunal also found that Starnino would not be prejudiced by a refusal to adjourn the Hearing because Starnino could seek a stay of the Tribunal's decision regarding the Costs Order pending the outcome of the judicial review application. Also, if the Divisional Court ruled that Starnino should not have been subjected to the Costs Order, the MOE could be ordered to repay any sum paid by Starnino.

The Tribunal found that Starnino had failed to meet the onus of demonstrating that an adjournment was warranted. The Tribunal dismissed the motion to adjourn and set the Hearing to proceed as scheduled.

Order released: August 24, 2007 (Case No.: 05-153)

Starnino Holidngs Limited v. Director, Ministry of the Environment (Decision)

This was the Tribunal's decision in the main Hearing of Starnino's appeal of a Costs Order issued by the Director, Ministry of the Environment (MOE), pursuant to section 150 of the *EPA*. The Costs Order required Starnino to pay $972,250.19 to the Ontario Minister of Finance as payment for the MOE's costs for the removal of waste from a waste disposal site at 10525 Keele Street in Vaughan, Ontario (the "Site"). Further background to this decision is set out in the summaries of the same name located above.

Two preliminary questions considered by the Tribunal were: what is the standard to be applied in determining what is unreasonable under section 145.3(2)(b) of the *EPA*; and who has the onus to show that costs are reasonable or unreasonable? The central issue considered by the Tribunal was whether, pursuant to section 145.3(2)(b) of the *EPA*, any of the costs specified in the Costs Order were unreasonable having regard to what was done by the Director. The Tribunal analyzed this broad issue in terms of the reasonableness of five decisions made by the Director in the course of the MOE's clean up of the Site.

There were two other issues dealt with by the Tribunal: whether certain documents tendered at the Hearing should be marked confidential, and whether the Tribunal's Decision should be stayed pending the disposition of the judicial review application before the Divisional Court.

1. What is the standard for determining what is unreasonable?

The Tribunal found that when assessing the unreasonableness of the costs incurred by the Director under section 143.(2)(b), the Tribunal must consider several factors. These included whether the Appellant's arguments fell within the scope of section 145.3(2)(b), that is, whether they addressed the unreasonableness of the costs incurred by the Director in carrying out the work, or whether they constituted an improper collateral attack on the underlying clean-up order. A second factor the Tribunal found relevant was whether the costs were unreasonable in the particular circumstances that existed at the time the costs were incurred. The third factor was whether the Director's decision(s) to incur costs were supported by any reasons, written or otherwise, which could stand up to a somewhat probing examination. The Tribunal explained that the third factor might involve considering whether the solution employed by the Director was reasonable, or whether there was a

tenable explanation for the costs incurred, even if the Director's solution might not be considered to be the best and/or least expensive one in a given scenario.

2. Who has the onus to show that costs were reasonable/unreasonable?

Since the Appellant conceded that nothing in this case turned on the question of onus, the Tribunal found that any determination of that question was best left to a case where the issue must be decided, and where the Parties had provided more detailed argument.

3. Whether any of the costs specified in the Costs Order were unreasonable having regard to what was done.

The Tribunal made ten findings in relation to this issue. First, the Tribunal found that the Director had not been unreasonable in using an abridged bidding process. The situation at the Site was sufficiently urgent to warrant the Director's escalating concern that there would be further fires. The Tribunal found that it was reasonable for the Director to adopt a tendering process in which contractors were assessed based on their ability to carry out the clean-up effectively and immediately. Further, the Tribunal found that the difference between the costs that actually resulted and those that would have resulted from a normal bidding process were not unreasonable having regard to the work that was done.

Secondly, the Tribunal found that it was not unreasonable for the Director to allow two firms to carry out the clean-up without a written contract. The Tribunal found that the condition of the Site and the nature of the work required to clean it up, meant it had been reasonable for the Director to evaluate the clean-up techniques on a continuing basis, and to provide approvals for extra costs verbally, as they arose. The Tribunal found that the close reporting relationship between the firms carrying out the clean-up and the MOE indicated that the firms had not received "carte blanche", and were not free to incur costs at will.

The Tribunal went on to consider whether each type of costs disputed by the Appellants was unreasonable. The first type of costs were those that resulted from a decision made by Integrated Municipal Management Services ("IMS") to lay gravel at the Site in order to reach the receding waste piles, and to build a circular road for trucks to enter and leave the Site. The Tribunal found that the costs that resulted from this decision were reasonable since speed was an urgent priority for the Director, and the laying of gravel occurred in order to hasten the removal of construction and demolition ("C&D") waste.

The second type of costs considered by the Tribunal were those stemming from IMS' decision not to screen C&D waste. The Tribunal noted that it would have been more cost effective over the long term to screen the C&D waste, but found that given the urgency of the situation, it was reasonable not to do so in this case.

The third type of costs considered by the Tribunal were those resulting from IMS' decision to take the waste to a landfill owned by Niagara Waste Systems Ltd. ("NWSL"), a sister company. The Tribunal found that there was no evidence to support the allegation that the tipping fee charged by NWSL in these circumstances was in any way inflated, out of the ordinary, or unreasonable.

The Tribunal also found that it was not unreasonable for IMS to use trucks owned by U-Pak, another sister company, since there was no evidence to support the Appellant's allegation that a corporate link between IMS and U-Pak resulted in any unreasonable trucking costs.

Additionally, the Tribunal found that given the divergent interests and strained relations between IMS and 310 Waste (a company already onsite and with available equipment at the time of the cleanup), it was reasonable for IMS to rent offices and equipment in order to get the job done efficiently. The Tribunal also found that it was not unreasonable to retain two firms to commence the clean-up of the Site because urgency was a prime consideration and it was apparent that finding the appropriate firm and equipment would be a challenge.

The Tribunal also found that it was not unreasonable of the Director to require that the waste be disposed of in Ontario. The Tribunal found that even though tipping fees might have been more expensive in Ontario than in Michigan, the potential for delays or refusals at the border, the fact that some of the trucks carrying the waste on the highways of Ontario were actually hot to the touch, and the prospect of creating a larger problem for waste disposal in Michigan, together generated enough risks that the higher cost, in-province option was reasonable.

Lastly, the Tribunal found that it was reasonable for the MOE to wait until December 16, 2004 to turn the clean-up over to Waste Excellence Corporation's receiver. It was not unreasonable for the MOE to take several weeks to put in place the detailed legal framework that could ensure that the receiver responsible for taking over the clean-up could be trusted to do the work properly.

4. Whether certain documents tendered at the Hearing should be marked confidential.

The Tribunal considered the MOE's request to mark some documents confidential in light of the principles underlying Rule 203 of the Tribunal's Rules of Practice and Practice Direction, and the common law doctrine of settlement privilege. The Tribunal found that three documents tendered by the MOE qualified for settlement privilege and would thus be marked confidential under Rule 203. The Tribunal found that it had not been presented with enough information to make a conclusion with regard to the confidentiality of four other documents. The Tribunal found that whether or not a document is relevant and admissible as evidence in light of the subject matter of a proceeding are not issues relevant to a determination under Rule 203. The Tribunal affirmed that the public interest is served by having documents introduced in a public Hearing made available to the public, even if the documents do not play a prominent role in the outcome of the Hearing.

5. Whether the Tribunal's Decision should be stayed with respect to Starnino, pending the disposition of any appeal of this Decision.

The Tribunal provided Starnino with the option of seeking a stay by way of an expedited teleconference if Starnino launched an appeal. If the Director consented to such a stay, the Parties could inform the Tribunal of their joint request in writing.

In summary, the Tribunal dismissed Starnino's appeal and upheld the Director's Costs Order. The Tribunal ordered that all or part of three documents filed with the Tribunal be marked confidential under Rule 203, so that they were not be part of the Public Record.

Decision released: November 29, 2007 (Case No.: 05-153)

Starnino Holdings Limited v. Director, Ministry of the Environment (Order)

This was a motion by Starnino Holdings Limited ("Starnino") for a stay of the Tribunal's Decision in *Starnino Holdings Limited v. Director, Ministry of the Environment*, November 29, 2007 (Case No.: 05-153). Further background can be found in the summary of that Decision located above. Briefly, in that Decision the Tribunal upheld a Costs Order issued by the Ministry of the Environment ("MOE") against Starnino, 310 Waste Ltd., 2020700 Ontario Inc., Rail Cycle Incorporated, 2020780 Ontario Limited, Edmon Hanna, and Robert Sansone (the "Orderees"). The Costs Order required the Orderees to remit $972,250.19 to the Ontario Minister of Finance as payment for the MOE's costs of removal of waste from a waste disposal site at 10525 Keele Street in Vaughan Ontario. Pursuant to section 143(1) of the *Environmental Protection Act* ("*EPA*"), the Costs Order was stayed until the Tribunal released its decision regarding Starnino's appeal. Subsequent to the Tribunal's decision, Starnino filed an appeal with the Divisional Court.

The issue before the Tribunal was whether it should grant a stay of the Tribunal's November 29, 2007 decision as it related to Starnino only, pending the disposition of Starnino's appeal to the Divisional Court.

The Tribunal considered the Motion for a stay under section 145.6(3) of the *EPA*, and found that the three-part test outlined in Rules 101(b), (c) and (d) of the Tribunal's Rules of Practice, and in *RJR-MacDonald Inc. v. Canada* [1994] 1 S.C.R. 311, favoured the granting of the stay. Under the first part of the test, the Tribunal found that there were no indications that Starnino's appeal to the Divisional Court was frivolous, and that, therefore, Starnino had raised a serious issue. On the second question of whether Starnino would suffer irreparable harm if the stay were not granted, the Tribunal commented that although it had been provided with little information from either Party, Stramino had met its onus through Mr. Starnino's brief evidence and the statements of Starnino's Counsel. With respect to the third factor, the Tribunal found that the balance of convenience favoured Starnino. The Tribunal found that there was little evidence of a risk that Starnino would dissipate its assets or that that there was a risk that the amount of the Costs Order could not be recovered from the other Orderees. The Tribunal found also that there was no evidence that the "polluter pays" and environmental accountability principles would be undermined as a result of a stay in this case.

The Tribunal commented that if the Director was aware of risks regarding Starnino's assets or a lack of assets of the other Orderees, then he could bring that evidence to the Divisional Court under section 145.6(4)(b) of the *EPA*.

The Tribunal ordered a stay of its decision dated November 29, 2007, pending the resolution of Starnino's appeal of that Decision to the Divisional Court.

Order released: February 6, 2008 (Case No.: 05-153)

Tonolli Canada Limited v. Director, Ministry of the Environment (Decision)

Tonolli Canada Limited ("Appellant") appealed a decision of the Director, Ministry of the Environment to issue an Amendment to Provisional Certificate of Approval Waste Disposal Site Number A220129 (the "Amended CofA"). The Appellant operated a lead acid battery recycling facility located in Mississauga, Ontario (the "Site"). The Amended CofA required the Appellant to provide the MOE with a "Financial Assurance evaluation" sufficient to ensure that funds would be available to the MOE to clean up the Site in the event that the Appellant was unable, or unwilling to do so. The deadline for filing the Financial Assurance was 60 days after the Director issued the Amended CofA.

The Parties notified the Tribunal that they had agreed that the Appellant would withdraw its appeal, and that the deadline for filing the Financial Assurance would be extended to February 29, 2008. Counsel for the Director notified the Tribunal that the Appellant's withdrawal of the matter was consistent with the purpose and provisions of the legislation and in the public interest. The Tribunal agreed, accepted the withdrawal, and pursuant to Rule 193 of the Tribunal's Rules of Practice, dismissed the appeal.

Decision Released: January 8, 2008 (Case No.: 07-101)

Niagara Escarpment Planning and Development Act

453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Order)

453294 Ontario Inc. (Phelan) ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application made by Braeburn Farm Ltd. ("Applicant"). The Development Permit allowed the Applicant to demolish a barn, and to replace it with a stable and attached arena, and a building for hay storage. The Appellant sought an adjournment of the Hearing, alleging that significant new information filed by the Applicant amounted to a new Development Permit application, and that the Applicant had built a new road over the subject property without the required permits.

The Applicant responded to the Motion for adjournment with a Motion to dismiss the appeal without a Hearing on the grounds that the appeal was frivolous, vexatious and without planning justification. The Appellant also asked for Costs in the Motion to adjourn.

The Hearing Officer considered two general issues.

1. Whether the Appellant should be granted an adjournment and whether the proceedings should be suspended until the Appellant could judicially review the Hearing Officer's denial of the Motion to adjourn.

The Hearing Officer denied the Motion to adjourn on the basis that the new information supplied by the Applicant addressed only those issues the Appellant had raised in its notice of appeal, and did not amount to a new Development Permit application. The Hearing Officer found that the Applicant's disclosure of the information two weeks in advance of the Hearing provided the Appellant with sufficient time for review, and allowed the Niagara Escarpment Hearing Office ("NEHO") to adjudicate fairly and efficiently under Rule 92 of the Rules of Practice of the Environmental Review Tribunal.

The Hearing Officer found that there was no legal requirement for the NEHO to suspend its proceedings pending judicial review of an interim Order, and that the judicial review application would not interfere with the scheduled NEHO proceedings in the appeal. The Hearing Officer noted that if the proposed suspension were granted, the purpose of the interim Order would be defeated, and the Appellant would receive an adjournment despite the Hearing Officer's refusal to grant one.

2. Whether the Appeal should be dismissed without a Hearing.

The Applicant withdrew its Motion to Dismiss and the Hearing Officer accepted it.

Counsel for the Appellant made a second request to adjourn the Hearing, and after the Hearing Officer denied it, Counsel withdrew from the proceedings and from the Hearing room. Thereafter, the Hearing Officer proceeded to hear the appeal and reserved her decision.

Order Released: July 9, 2007 (Case No.: 06-097)

453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Order)

This Order concerned a Motion for Costs to be paid by 453294 Ontario Inc. ("Appellant"). Braeburn Farms Ltd. ("Applicant") sought $10,646.81 in costs for its response to the Appellant's Motion to adjourn. Further background to this Order is set out in the summary by the same name located above.

The Hearing Officer found that when determining a request for costs under section 17.1 of the *Statutory Powers Procedure Act* and Rule 205 of the Environmental Review Tribunal's Rules of Practice, a Hearing Officer should follow the three stage analysis laid out in *Johnson v. Ontario (Ministry of Environment)* [2006] O.E.R.T.D. No. 20.

The Hearing Officer found that the Appellant's overall course of conduct implied that the Motion to adjourn was brought, in part, for improper motives, qualifying it as unreasonable and vexatious. Specifically, the Appellant failed to present evidence at the Hearing and acted disrespectfully when its request for an adjournment was denied. The Hearing Officer found that despite the shortcomings in the Appellant's conduct, its Motion to adjourn raised valid points of law and was not frivolous. New material filed by the Applicant two weeks prior to the Hearing and the emergence of the issue of a proposed new road, raised legitimate grounds on which to seek an adjournment. The Hearing Officer found that although the Motion to adjourn formed part of the Appellant's course of improper conduct, it nevertheless remained, by and large, within the four corners of the Environmental Review Tribunal's Rules of Practice. The Hearing Officer dismissed the Motion for Costs.

Order released: August 14, 2007 (Case No.: 06-097)

453294 Ontario Inc. (Phelan) v. Niagara Escarpment Commission (Decision)

This was a recommendation by a Hearing Officer of the Niagara Escarpment Hearing Office, to the Minister of Natural Resources (the "Minister") with respect to an appeal by 453294 Ontario Inc. (Phelan) ("Appellant") of the Niagara Escarpment Commission's (the "NEC's") decision to issue a Development Permit (the "Permit") to Braeburn Farm Ltd. (the "Applicant"). The Permit allowed the Applicant to demolish an existing barn and replace it with a stable with an attached arena and hay storage building, and to install a private sewage disposal system on a lot located at Lot 10 Concession 1, in the Town of Blue Mountain, County of Grey. Further background to this recommendation can be found in the two summaries of the same name, located above.

The grounds of the appeal focused on the impact that the proposed building would have on the Appellant's privacy and views, as well as the public's view of the Escarpment. The Appellant was also concerned that noise from horses and vehicles would disturb its "right to a peaceable environment". Additionally, the Appellant was concerned that if the Applicant were permitted to keep livestock in that location, the water quality and fish habitat of the Black Ash Creek and its tributaries might be negatively impacted. Finally, the Appellant alleged that the property boundaries and setbacks included in the Attachments to the Development Permit were not accurate.

The Hearing Officer considered two issues:

1. Whether the NEC decision to conditionally approve the Braeburn Farms Ltd. application for a Development Permit was made in accordance with the NEP, and

2. Whether the NEC decision could be improved through amending Conditions 5 and 6 to incorporate the June 4, 2007 Revised Site Plan and supporting materials considered at the Hearing.

With respect to the first issue, the Hearing Officer found that the proposed development, consisting of "agricultural operations", "existing uses" and "accessory buildings, structures and facilities", qualified as a permitted use under Part 1 of the NEP. The Hearing Officer also considered whether

any of the Appellant's Grounds of appeal indicated that the proposed development failed to comply with the Development Criteria set out in Part 2 of the NEP. The Hearing Officer found that despite a deficiency in the initial Development Permit application, the Applicant had subsequently provided the NEHO with a detailed land survey of the subject property which dispelled any doubt about the locations of the property line and the barn, and indicated that the setback of the barn from the Appellant's property was sufficient to maintain his privacy. The Hearing Officer found that the Appellant had not provided any evidence in support of the proposition that there exists in law a right to a view, or that the proposed development would impede the open landscape character of the Escarpment features under Part 1.4 of the NEP. The Hearing Officer found also that the Appellant had not provided any evidence indicating that the proposed development could have a substantial negative impact on the visual attractiveness of the Escarpment under Part 2.2.1 (a) of the NEP. On the question of whether the proposed development would negatively impact water quality and fish habitat, the Hearing Officer found that the proposed development complied with Parts 2.2.1 (b) and 2.6 of the NEP because it had the approval of the Nottawasaga Valley Conservation Authority (the "NVCA"), and included a condition satisfying the NVCA's concerns regarding site grading, fill placement, sediment and erosion control and revegetation. Further, the proposed manure pit would be set back from the Black Ash Creek at a distance more than twice that required by the County of Grey, who also supported the Permit application.

On the second issue, the Hearing Officer found that the NEC decision could be improved by adding revised Conditions 5 and 6, which increased the protection of the Escarpment, including Black Ash Creek and its tributary. The Applicant and the NEC agreed to the revised conditions. Because the Appellant was not present at the Hearing, and had not officially withdrawn its appeal, the Hearing Officer could not confirm the NEC's decision with the revised Conditions under section 25(12.1) of the *NEPDA*, which requires that all parties agree to any revised conditions of approval. Instead, the Hearing Officer recommended to the Minister of Natural Resources, that the NEC's decision to approve the Permit with amended Conditions 5 and 6 be approved.

The Minister issued a Decision on February 6, 2008 concurring with the Hearing Officer's recommendations, and directing the NEC to issue a Development Permit subject to amended Conditions 5 and 6.

Decision released: February 6, 2008 (Case No.: 06-097)

Albright v. Niagara Escarpment Commission (Decision)

Eris Albright ("Appellant") filed an appeal of a decision of the Niagara Escarpment Commission ("NEC"), pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"). The NEC decision conditionally approved a Development Permit application to demolish an existing single dwelling and to construct two new residences on a 0.08 ha remnant lot located in the former Town of Ancaster, City of Hamilton.

During the course of the Proceeding, a Minister's Regulation was filed amending the "Designation of Area Development Control," O.Reg. 826 made under the *NEPDA*. Upon filing, the Regulation removed certain areas from Development Control, including the Appellant's property. The Hearing

Officer relied on the recent decision of *Davies v. Niagara Escarpment Commission,* [2007] O.E.R.T.D. No. 55, and found that since the legislative basis for the proceeding had been removed, the matter was moot, and the Niagara Escarpment Hearing Office no longer had any jurisdiction to consider the Appellant's application for a Development Permit.

Decision released: November 1, 2007 (Case No.: 06-200)

Baleka v. Niagara Escarpment Commission (Decision)

Peggy Baleka ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve the issuance of a Development Permit (the "Permit") to Farid Jalilian ("Applicant") recognizing the existing pond and deck located on a 4310 m^2 residential property on Part Lot 32, Concession 3, in the Regional Municipality of Peel (the "Site").

The Hearing Officer found that after further consideration, the Parties agreed that the Permit was justified for several reasons. First, they felt that remediation of the concerns and issues raised by the Appellant should be addressed with the Town of Caledon and/or the Region of Peel. Secondly, they agreed that the construction of ditches on both sides of Creditview Road and a swale on the south side of the farmland to the north of the Site would reduce the inundation of the Applicant's property by surface water runoff from the neighbouring farm lands. The Parties agreed also that access to the pond by children and animals fell under the purview of health and safety bylaws, and not the NEC. Finally, the Parties agreed that a swale installed on the east side of the Applicant's and Appellant's properties in the farm field adjacent to their fence lines would alleviate the wet, swampy conditions in the southeast corner of the Applicant's property and the east side of the Appellant's property.

The Hearing Officer found that the NEC's decision to conditionally approve the Permit was correct. Pursuant to section 25(1) of the *Niagara Escarpment Planning and Development Act*, the NEC decision was confirmed.

Decision released: February 25, 2008 (Case No.: 07-097)

Barlow v. Niagara Escarpment Commission (Decision)

Twenty-eight local residents ("Appellants") filed Notices of Appeal with the Niagara Escarpment Hearing Office ("NEHO") regarding the conditional approval of a Development Permit application (the "Permit Approval") by the Niagara Escarpment Commission ("NEC"). The Permit Approval allowed the City of Hamilton ("City") to construct a stairway (and associated lighting), providing pedestrian access from Mountain Brow Boulevard and Margate Avenue to the Escarpment Rail Trail, located in the City of Hamilton, Ontario.

Between the time of the NEC's decision, and the Hearing of the appeal, the NEC discovered three errors in the NEC Staff Report, and in Condition No. 8 of the Conditions of Approval ("CofA"). The first error was that the NEC Staff Report contained an erroneous description of the Margate Avenue site. Secondly, the Niagara Escarpment Correction Notice prepared by the NEC included

an incorrect site plan, and thirdly, the background information included in the CofA, and in Condition of Approval No. 8 incorrectly named the consultants who had performed the groundwater studies. The NEC argued that before the conditional approval could be confirmed, the errors must be corrected. The Appellants did not consent to the corrections proposed by the NEC because they opposed the project in its entirety.

The Hearing Officers considered two main issues:

1. Whether the Development Permit application accorded with the Land Use Policies of Part 1 of the NEP regarding Escarpment Natural Areas.

The Hearing Officers considered whether access to the Escarpment via the proposed metal staircase was a type of recreation permitted within Escarpment Natural Areas under Part 1.3 of the NEP. The Hearing Officers rejected the argument that a proposal must fall entirely in one permitted use in order to be allowed. It found that the proposal accorded with the Land Use Policies of Part I of the NEP, by falling within a combination of permitted uses, including: "non-intensive recreation use" (permitted use #4), "accessory structures" (permitted use #8), and/or "incidental use" (permitted use #9).

2. If the Development Permit application accords with the Land Use Policies of Part I of the NEP, does it comply with the Development Criteria of Part 2 of the NEP?

The Hearing Officers based their conclusion on this issue largely on evidence relating to the Environmental Impact Study and Addendum included in the City's proposal. The Hearing Officers found that the proposal complied with all applicable development criteria in Part 2 of the NEP. The Hearing Officers found also that the proposal furthered the relevant objectives of the NEP for Escarpment Areas, fell within the NEP's permitted uses, and accorded with all relevant development criteria.

The Hearing Officers found that the substance of the NEC's decision was correct, and recommended to the Minister of Natural Resources, that he direct the NEC to approve the proposal, subject to necessary corrections to Condition 8 and the site plan.

On May 14, 2007, the Minister of the Natural Resources issued a decision adopting the Hearing Officers' recommendation, and directing the NEC to issue a Development Permit subject to conditions, to the City of Hamilton.

Decision released: March 26, 2007 (Case Nos.: 06-059 to 06-087)

Behan v. Niagara Escarpment Commission (Decision)

Don Behan and Juliet Nelson ("Appellants") appealed a decision of the Niagara Escarpment Commission ("NEC") conditionally approving a Development Permit application that had been made by Martha and Steven Drake ("Applicants"). The proposal was to construct an addition to a

dwelling on a ± 0.48 ha existing lot known as Lot 23, Concession 14, located in the Municipality of Grey Highlands in the County of Grey (the "Site").

After a Pre-Hearing teleconference, a change in the regulations under the *Niagara Escarpment Planning and Development Act* meant that the Site was no longer in the area of Development Control falling within the jurisdiction of the NEC. The Hearing Officer found that this eliminated the legislative basis for the proceeding and left the NEHO without jurisdiction to consider a Development Permit application for the subject property. The application would now have to be pursued at the municipal level, and any disputes arising from it would lie to the Ontario Municipal Board, not the NEHO. The Hearing Officer dismissed the Development appeal for lack of jurisdiction.

Decision released: August 2, 2007 (Case Nos.: 07-017/07-018)

Bloom v. Niagara Escarpment Commission (Decision)

In this case Steven and Marilyn Bloom, Abram and Cheryl Dick, Nancy Fung and Michael Kopp, Howard and Jean Prout, and Sam Roy ("Appellants"), filed appeals of a decision of the Niagara Escarpment Commission ("NEC") pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"). The NEC decision conditionally approved Patrick Latcham's application for a Development Permit (the "Permit") to construct a 2 storey, single dwelling, with an attached garage, a driveway and a sceptic system, as well as an incidental pond with a maximum depth of 3.65 m. The Permit applied to an existing 4 ha lot located on Concession 6, Part Lot 6, known municipally as 2408 Seven Street Louth, in the City of St. Catharines. The Appellants also challenged a licence granted to Mr. Latcham by the City of St. Catharines, allowing him to construct and maintain a driveway on an unopened road allowance, including an entrance, onto Seveth Street Louth.

The Appellants' submissions addressed two issues. The first was whether winter melt-water runoff from the proposed driveway and access road would act as a barrier to the normal flow of surface water from adjacent fields, thereby creating a flood-risk and attendant drainage and/or erosion problems. The second issue was whether the proposed access road failed to meet municipal standards respecting grades and sight lines, and whether the addition of another access onto Seventh Street Louth was a hazard to traffic safety. After discussions between the Parties, the Appellants accepted that the conditions contained in the Permit were sufficient to meet their concerns, and that the NEC's decision to grant the conditional Permit could be confirmed.

The Hearing Officer found that the NEC's decision to conditionally approve Mr. Latcham's application for a Development Permit was correct, and pursuant to section 25(12) of the *NEPDA*, confirmed the decision.

Decision released: January 30, 2008 (Case Nos.: 07-107 to 07-115)

Boles v. Niagara Escarpment Commission (Decision)

Russell Boles ("Appellant") appealed a decision of the Niagara Escarpment ("NEC") to conditionally approve his application for a Development Permit for the construction of a Bed and Breakfast Home and accessory facilities. The Appellant appealed Conditions 11 and 14 set out in the conditional approval. Condition 11 required the Appellant to submit a Tree Preservation Plan prepared by a qualified Landscape Architect, and Condition 14 prohibited the use of the detached storage and horse barn for human habitation or any commercial/industrial activities.

Following discussions, the Parties jointly submitted a Settlement Document setting out revisions to the conditions of approval. The issue before the Hearing Officer was whether the NEC's decision to issue the conditional Development Permit was correct.

The Hearing Officer found that terms of the revised conditions of approval satisfied the Appellant's concerns regarding Condition 14, and complied with section 1.4 of the Niagara Escarpment Plan by using an enclosed breezeway to make the garage and the bedroom above it part of the main dwelling. The terms of the revised conditions of approval also modified Condition 11, so that a "person of equivalent competence" to a Landscape Artist could prepare the necessary Tree Preservation Plan. The NEC accepted that the Appellant, who was a graduate of the Niagara Parks Commission School of Horticulture, a retired Manager of Horticulture for the Niagara Parks Commission, and had over 40 years of experience as a horticulturalist, had the expertise to prepare the Tree Preservation Plan.

The Hearing Officer found that the NEC's decision to conditionally approve the Development Permit with the revised conditions of approval was correct, and pursuant to section 25(12.1) of the *Niagara Escarpment Planning and Development Act*, the NEC's decision was confirmed.

Decision released: October 23, 2007 (Case No.: 07-066)

Briggs v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Development Act* ("*NEPDA*"), Glenn Briggs ("Applicant") appealed a decision of the Niagara Escarpment Commission ("NEC") approving his Development Permit application subject to 19 conditions. He appealed on the ground that Condition 18 revoked a previous approval to operate a storage business.

In a teleconference, the NEC's planner indicated that he had drafted Condition 18 on the assumption that the storage business was no longer in operation. The NEC's Planner acknowledged that this assumption was incorrect and the Parties agreed to adjourn the Pre-hearing Conference so that they could draft a mutually agreeable revision to Condition 18.

The Parties subsequently signed a written agreement approving an amendment to Condition 18. The amendment created an exception that would allow the Applicant to continue his existing storage operation on the property, though all other commercial, industrial and residential uses, as well as the keeping of livestock would be disallowed.

The Hearing Officer found that the NEC's decision to conditionally approve the Development Permit, with amended Condition 18, was correct. Pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision.

Decision Released: April 20, 2007 (Case No.: 06-197)

Caetano v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Development Act*, ("NEPDA"), Philip Caetano ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC"), to conditionally approve three Development Permit applications by Piccioni Bros. Mushroom Farm Ltd. ("Applicant"). The Development Permits allowed the Applicant to construct and modify a number of structures and facilities used in its existing mushroom growing operation located on Part Lot 20, Concession 2, in the City of Hamilton, Ontario.

At a Pre-Hearing Conference, Eric Waugh, a neighbour of the Applicant, was granted Party status. Louis Agro, Brian Evans and Gaeton Dionne were granted Participant status. During the course of the Hearing, the Parties conducted negotiations and presented the Hearing Officer with a draft Settlement Agreement that would alter the terms and conditions of each of the three conditionally approved Development Permit applications.

The issue before the Hearing Officer was whether the NEC's decision to conditionally approve the Applicant's three applications, amended to include the terms and conditions of the Settlement Agreement, was correct and should not be changed.

Based on the evidence provided by David Johnston, a Planner with the NEC, and on what was observable from a Site visit, the Hearing Officer found that there were no odours emanating from any outside operations at the Site. He found also that the use of state-of-the-art odour control equipment, and the potential oversight of the Ministry of the Environment regarding emissions and the handling of leachate, provided sufficient protection for the Site's neighbours.

The Hearing Officer considered the Appellant's earlier concerns about increased traffic, and the potential for creating an eyesore on the Escarpment, but found that each concern was supported by insufficient evidence. Further, the Hearing Officer found that the increased development would not have a negative effect on the aquifer since the Settlement Agreement required the Applicants to use best practices to limit the intake of water from the groundwater aquifer, and also to recycle water.

The Hearing Officer found that the NEC's decision to conditionally approve the Development Permits, as amended by the Settlement Agreement, was correct. Pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision.

Decision released: October 5, 2007 (Case Nos.: 07-036/07-037/-7-038)

Condotta v. Niagara Escarpment Commission (Decision)

John Condotta and Tansu Barker appealed a decision of the Niagara Escarpment Commission ("NEC") to approve a Development Permit application made by the Stamford Centre Volunteer Firemen's Association (the "Association"). The Development Permit was for the construction of a one-storey building to be used by the Association for business and events, on an existing parcel of land known as Firemen's Park (the "Park"), located in the City of Niagara Falls, Ontario.

The issue before the Hearing Officer under section 25(12) of the *Niagara Escarpment Development Act* ("*NEPDA*"), was whether the NEC's decision to conditionally approve the Association's application for a Development Permit was correct and should not be changed.

Mr. Condotta indicated that his primary concern was with the location of the building, though for reasons unknown to the Hearing Officer, Mr. Condotta failed to appear at the Hearing in support of his appeal. Mr. Barker also objected to the location of the building on the grounds that it would detract from the scenic appearance of the Park.

The Hearing Officer noted that Mr. Barker failed to provide any evidence that the proposed building was contrary to the NEP, was not in the public interest, or would degrade the Park and the natural environment. The Hearing Officer found that the proposed building would be in keeping with the intent of the NEP since it would complement the area, and be as unobtrusive as possible.

The Hearing Officer found that the NEC's decision to conditionally approve the Association's application for a Development Permit was correct, and confirmed the NEC's decision pursuant to section 25(12) of the *NEPDA*.

Decision released: November 2, 2007 (Case No.: 07-060/07-061)

Cooper v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Nancy Cooper and Brian Hay ("Appellants") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application made by Joanne Neven. The Development Permit was for the demolition of a 1 storey ± 83.61 sq m single dwelling, and the construction of a 1-2 storey ± 325.15 sq m single dwelling on an existing 0.67 ha lot located at Part Lot 36, Concession 1, in the City of Hamilton.

At the Pre-Hearing Conference, the Parties agreed on amendments to the Conditions of Approval. The Parties agreed that the Environmental Impact Study that had been requested by the City of Hamilton did not need to be completed. They also agreed to add several new conditions specifying the maximum limits for height and area for the building, the minimum distance for the set back, and landscaping measures requiring that Ms. Neven obtain prior approval from the NEC with regard to which types of trees would be planted.

The Appellants agreed that the proposed amendments addressed the concerns they had raised in their appeal. The Hearing Officer found that the NEC's conditional approval with amendments was correct, and pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision.

Decision released: October 11, 2007 (Case Nos.: 07-062/07-063)

Davies v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Glenn and Nancy Davies, Patrick and Josephine Lashmar, Paul and Christine Bolduc, and John Flaminio ("Appellants") appealed a decision of the Niagara Escarpment Commission ("NEC") conditionally approving a Development Permit application. (the "Development Permit"). The Development Permit would have allowed Kuldip Swan, (the "Applicant") to convert a two storey dwelling into a day care centre, and to construct a second driveway and 14 parking spaces. After the Hearing, a Minister's Regulation was filed amending "Designation of Area of Development Control", O.Reg. 826 (the "Regulation"), made under the *NEPDA*. The Regulation removed the site of the proposed day care centre from an area subject to Development Control. The NEC subsequently requested that the Niagara Escarpment Hearing Office (NEHO) terminate the proceeding on the ground that it had become moot, since the NEC no longer had any jurisdiction to issue a Development Permit or otherwise deal further with the application.

The Hearing Officers found that the amendment to the Regulation meant that the NEC no longer had the authority to regulate land use on the Applicant's property through the Development Control system. The Hearing Officers found that the appeal had become hypothetical and moot under the test set out by the Supreme Court of Canada in *Borowski v. A.G. Canada*, [1989] 1 S.C.R. 342. The Hearing Officers found further that the issues raised by the appeal were insufficiently general to be of public importance, and did not justify expending the NEHO's resources.

The Hearing Officers also considered whether the Applicant had possessed an accrued right to the issuance of the Development Permit at the time the Regulation had been amended. Drawing on a recent decision of the Ontario Municipal Board, *Niagara Escarpment Commission v. Paletta International Corp.*, [2007] O.J. No. 3308, the Hearing Officers found the Applicant had only a "hope or expectation" that the Development Permit would be approved, and did not have a right. The Hearing Officers dismissed the appeal.

Decision released: October 11, 2007 (Case Nos.: 07-019/07-020/07-023/07-024/07-025/07-026/07-030)

Laxton v. Niagara Escarpment Commission (Decision)

Wayne and Marilyn Laxton ("Appellants") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approval a Development Permit application under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"). The Development Permit allowed Lisa Sherk ("Applicant") to build a new building for the storage of personal effects,

collector vehicles and other items. The subject property was not located within the Niagara Escarpment Plan ("NEP") Area, though it was within the Development Control Area under *NEPDA* O.Reg. 826.

The Hearing Officer found that the proposed development did not contravene any of the requirements of the Greenbelt Plan. Further, since the NEC's approval had exhibited a concern with limiting encroachment on agricultural land as much as possible, it was consistent with the "Vision" of the Greenbelt, set out in section 1.2.1 of the Greenbelt Plan.

The Hearing Officer found that the development as approved by the NEC also satisfied the Greenbelt Plan's requirements for "Protected Countryside" as set out in section 4.5 of that Plan. This was because the proposed development represented an existing use, required no new municipal services, and would not expand into key natural heritage, or hydrologic features.

The Hearing Officer noted that although the Appellants had important concerns about the development's possible effect on their view and on the enjoyment of their property, these concerns were not relevant to the purposes and objectives of the *NEPDA* as set out in sections 2 and 8 of that Act.

The Applicant had agreed to move the storage facility further into her own property and behind a hedgerow. Condition 8 of the Development Permit required screening, landscaping and rehabilitation, including the creation of a tree-planting plan. The Hearing Officer found that the conditions struck an adequate balance between the rights of the Applicant and the concerns of the Appellants.

The Hearing Officer noted that although municipal zoning by-laws did not apply to this application, they could be considered for reference. The Hearing Officer found that since the proposed structure was compatible with the established neighbourhood, and would be used for storing personal vehicles, it was in keeping with the relevant by-law.

Finally, the Hearing Officer found that there was no evidentiary foundation supporting the Appellants' concern that the building might be used for refinishing old vehicles. Accordingly, the Hearing Officer found that the NEC's decision to conditionally approve the application was correct and should not be changed. Pursuant to section 25(12) of the *NEPDA*, the NEC's decision was confirmed.

Decision released: May 14, 2007 (Case No.: 06-193/06-194)

Merriam v. Niagara Escarpment Commission (Decision)

Under section 25(8.1)(a) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Kathleen Hughes ("Applicant") requested that the Niagara Escarpment Hearing Office ("NEHO") dismiss the appeals of John and Joan Merriam ("Appellants"). The Appellants had appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application made by the Applicant. The approval of the Development Permit would allow

the Applicant to construct a one storey dwelling with sewage system and driveway, in the Municipality of Grey Highlands, in the County of Grey, Ontario.

In an Order issued November 13, 2007, the Hearing Officer dismissed the Applicant's request that the Hearing Officer refuse to conduct a Hearing of the appeal in accordance with section 25(8.1) of the *NEPDA* and Rule 100 of the Rules of Practice and Practice Directions of the Environmental Review Tribunal. The issue before the Hearing Officer was whether he should refuse to conduct a Hearing of the appeals on the grounds that they were frivolous or vexatious.

The Hearing Officer noted that pursuant to section 25(8.1) of the *NEPDA*, a party requesting dismissal has the onus of showing how the appeal fails to disclose a planning justification, is without merit, is frivolous or vexatious, or is for the purpose of delay. In addition, the Hearing Officer stated that the bar for summary dismissal is a high one.

The Hearing Officer found that the appeal did not fail to raise a substantive planning issue, and was, therefore, not frivolous. The Appellants had raised the issue of the visual impact of the proposed development, and this qualified as a planning issue under the Niagara Escarpment Plan's General Development Criteria 2.2.4.

The Hearing Officer found that the appeal was not vexatious. The evidence did not indicate that the Appellants had clearly intended to use the appeal to cause some prejudice to the Applicant for reasons unrelated to any valid substantive issue. Accordingly, the Hearing Officer denied the motion to dismiss the appeals.

On November 15, 2007, the Appellants withdrew their appeal, and the Hearing Officer confirmed the NEC's decision to conditionally approve the Development Permit.

Decision released: November 16, 2007 (Case Nos.: 07-087/7-088)

Mueller v. Niagara Escarpment Commission (Decision)

Leo and Dina Pedra ("Applicants") applied to the Niagara Escarpment Commission ("NEC") for a Development Permit to demolish an existing two storey single dwelling and two existing one storey sheds, and also to construct a two storey single dwelling on Part Lot 7, Concession 1, in the Town of Halton Hills, in the Region of Halton (the "Site"). The Site was within the Escarpment Protection Area designation of the Niagara Escarpment Plan. The NEC approved the application subject to 16 conditions. Subsequently, Robert and Susan Mueller ("Appellants"), owners of property adjacent to the Applicants' property, filed an appeal of the NEC's decision. At a Pre-Hearing Conference the Parties indicated that they had reached a provisional resolution of the appeal. The Parties later wrote to the Niagara Escarpment Hearing Office indicating that they consented to revised and new Conditions of Approval and a revised site plan. The revised site plan addressed each of the Appellant's grounds of appeal relating to potential impacts on: (1) views, (2) privacy, (3) surface run-off, (4) cultural heritage features, and (5) wildlife.

The Hearing Officer found that the NEC decision with revised and new Conditions of Approval was correct. Pursuant to section 25(12.1) of the *Niagara Escarpment Development Act*, the Hearing Officer confirmed the NEC's decision.

Decision released: October 22, 2007 (Case Nos.: 07-072/07-083)

Paletta International Corporation v. Niagara Escarpment Commission (Decision)

Under section 25(8) of the *Niagara Escarpment Development Act* ("*NEPDA*"), Paletta International Corporation ("Appellant") appealed the Niagara Escarpment Commission's ("NEC's") decision to conditionally approve a Development Permit application (the "Permit"). The Permit authorized Nediljko Saric ("Applicant") to construct a two-storey single dwelling with an attached garage, rear patio, septic system and driveway on a proposed lot of ± 8 acres (±3.23 ha), in the City of Burlington.

The Hearing Officers considered three general issues:

1. Whether the conditions were sufficient to protect the groundwater in the area, given the proposed lot sizes.

The applicant conducted a site-specific hydrogeology study to the satisfaction of the Regional Health Department. On this basis, the Region of Halton (the "Region") and the City of Burlington (the "City") recommended approval of the development proposal even though the proposed lot did not meet the Niagara Escarpment Plan's minimum lot size requirement for the Mount Nemo area. The Region commissioned and considered a peer review by Leon Bryck which endorsed the Development Permit but recommended that the remnant parcel be increased from 0.89 ha, to 1.0 ha.

The Hearing Officers found that the increase in the remnant parcel proposed by the peer review would meet the Appellant's concerns about water quality. The exact size and configuration of the new and remnant lots would be determined at the municipal severance stage in a manner that implemented the peer review's recommendations and in satisfaction of Condition of Approval 9.

The Hearing Officers found that the Applicant had proposed a density that was far short of the maximum permitted and there had been no evidence of any adverse effects, cumulative or otherwise, that would result after the Conditions of Approval and the recommendations regarding the size of the remnant lot were implemented. In summary, on the first issue the Hearing Officers found that the conditions were sufficient to protect the area's ground water.

2. Whether the size of the proposed home was appropriate.

The City placed a size limit on the houses in the nearby "Bluffs of Burlington" for the purpose of ensuring that they blended with the existing hamlet of Mount Nemo. The Hearing Officers found that the size limits were not legal standards to be applied rigidly. The Hearing Officers

acknowledged that the character of the surrounding neighbourhood was relevant under the NEP, but found that the evidence presented at the Hearing indicated the proposed home was not incompatible with that character.

3. Whether a Condition should be added requiring cost sharing by the Applicant for the extension of a side road and whether the NEHO has the jurisdiction to include such a condition in a Development Permit.

The Hearing Officers found that section 25(4) of the *NEPDA* limited the jurisdiction of the NEHO so that it could impose only those terms and conditions available in the NEP. Under Part 2.2.1 of the NEP, the Hearing Officers found that the NEHO could impose cost sharing provisions provided they could be incorporated into the Conditions of Approval through an applicable "municipal requirement." In this case, there was no municipal cost-sharing requirement with regard to the side road in issue, so the Hearing Officers found it was outside their jurisdiction to add the Condition sought by the Appellant.

The Hearing Officers found that the NEC's decision to conditionally approve the Development Permit was correct, and pursuant to section 25(12) of the *NEPDA*, the NEC's decision was confirmed.

Decision released: May 31, 2007 (Case No.: 06-001)

Paletta International Corporation v. Niagara Escarpment Commission (Order)

Pursuant to section 25(5)1 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Upcountry Estates Inc. ("Upcountry"), and four related companies – Paletta International Corporation ("Paletta International"), Paletta International (2000) Inc. ("Paletta 2000"), Waterdown Bay Ltd. ("Waterdown") and 2036353 Ontario Inc. ("2023653) – appealed a decision of the Niagara Escarpment Commission ("NEC"), to conditionally approve a Development Permit application (the "Development Permit") made by Basil Gillyatt. The conditionally approved Development Permit allowed Mr. Gillyat to construct a one storey, ±297 sq m manure storage facility for the management of two existing chicken barns, on an existing 4.06 ha lot on Part 2, Concession 3, in the City of Hamilton (the "Site").

The issue before the Niagara Escarpment Hearing Office (the "NEHO") was whether, under the terms of sections 25(5) and 25(5.1) of the *NEPDA*, the appeals of Upcountry and Paletta fell within the jurisdiction of the NEHO.

Despite not having received Notice of the NEC's decision to issue the conditional Development Permit, Upcountry argued that the NEHO had the jurisdiction to accept its Notice of Appeal provided Upcountry could establish its lands lay within 120 metres of the subject property. The Hearing Officer found that based on the wording of sections 25(5)1 and 25(5.1) of the *NEPDA*, the Hearing Officers could not second-guess whom the NEC identified as a qualifying recipient of Notice of an NEC decision, and who thereby gained a right to appeal that decision to the NEHO.

The Hearing Officer found that even if Upcountry's assessed lands were within 120 metres of the land that was the subject of the NEC's decision, and thereby qualified for Notice under section 25(5), it was not for the NEHO to correct the NEC's list of Notice recipients. The Hearing Officer commented that if Upcountry and the NEC could not agree on whether the distance between Upcountry's land and the subject land was less than 120 meters, Upcountry could pursue its argument that it was entitled to notice in the courts.

The Hearing Officer found also that he did not have the jurisdiction to supplant the NEC's decision with regard to who "may have an interest" in the NEC's decision, and thus receive Notice under section 25(5)1. The Hearing Officer found that the NEHO could not consider the appeals of Upcountry, Paletta 2000 and Waterdown on the basis that their interests were sufficiently engaged. The Hearing Officer reiterated that if the Parties wished to challenge the NEC's determination in this regard, the proper forum was a court. The Hearing Officer found further, that section 25(5)1 provided a right of appeal to only those persons to whom the NEC provided notice, and that persons who became aware of the NEC's Notice of Decision through some other route (as did Upcountry, Paletta 2000 and Waterdown), did not, thereby, gain a right to appeal the NEC's decision.

Despite concluding that the NEHO had no jurisdiction to hear the appeals of Upcountry, Waterdown and Paletta 2000, the Hearing Officer found that they had a genuine interest in the proceeding, and pursuant to Rule 54 of the Environmental Review Tribunal's Rules of Practice, the Hearing Officer granted them Party status.

The Hearing Officer ordered that the Notice of Appeal for Paletta International and 2026353 be accepted. He also dismissed the Notices of Appeal filed by Upcountry, Paletta 2000 and Waterdown, while granting these companies Party status.

Order released: January 29, 2008 (Case Nos.: 07-116/07-117/07-124/07-125/ 07/126)

Paletta International Corporation v. Niagara Escarpment Commission (Decision)

Paletta International Corporation ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") allowing Nediljko Saric ("Applicant") to conduct various landfill and grading activities over a portion of a ± 4 ha (± 10 ac) lot located on Part Lots 14-15, Concession 2, in the City of Burlington (the "Site").

The issues before the Hearing Officer were whether Conditions dealing with road traffic, vehicular access to the Site, and water flow and drainage at the Site should be added to the Permit, as requested by the Appellant.

The first Condition would prohibit vehicular or equipment traffic related to any use at the Site from traveling on Escarpment Drive or Bluffs Way. It would further require access to and from the Site to be restricted to an already existing driveway. The Appellant had paid for the construction of the portion of No. 2 Sideroad that ran beside the Applicant's property, and sought to have the Applicant either contribute toward the cost of that section of No. 2 Sideroad, or be prohibited from using it to

gain access to the Site. The Hearing Officer found that under section 25(4) of the *Niagara Escarpment Development Act* ("*NEPDA*") he was limited to considering those aspects of the Appellant's concerns that related to the Niagara Escarpment Plan ("NEP"). Referring to the Niagara Escarpment Hearing Office's ("NEHO's") earlier decision in *Paletta International Corp. v. Niagara Escarpment Commission,* [2007] O.E.R.T.D. No. 37, the Hearing Officer found that the Appellant's request for cost sharing with regard to No. 2 Sideroad related to a conflict involving purely private interests, and did not fall within the jurisdiction of the NEHO.

The Hearing Officer found that it was not within his mandate to make a determination with regard to the second Condition proposed by the Appellant. That Condition would have prevented alteration of water flow or drainage pattern on the Applicant's property that could result in any surface water crossing the reserve at the boundary of that property. The Hearing Officer found that the Appellant sought this Condition in order to support its attempt to recoup some of its development costs from the Applicant, and that it did not advance or even address the purposes of the *NEPDA* and the NEP. The Hearing Officer found that intervening in an ongoing dispute that was purely financial in nature between a developer and a neighbouring property owner, was not within his jurisdiction under the *NEPDA* or the NEP.

The Hearing Officer found that the NEC's decision to conditionally approve the Permit was correct, and pursuant to section 25(12) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision.

Decision released: February 15, 2008 (Case No.: 07-080)

Pemberton v. Niagara Escarpment Commission (Decision)

Ron Morin, Paul Dodson, Mike Shantz and Hilda Darcie ("Appellants"), appealed a decision of the Niagara Escarpment Commission ("NEC") under section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"). The NEC's decision had been to provide conditional approvals for three Development Permit applications ("Permits"), made by Timur Leckebusch ("Applicant"). Two of the Permits related to equestrian events and the other related to a dog agility competition, all to occur on a farm located at 93828, 15 Side Road, Halton Hills, Ontario (the Site).

The overall issue before the Hearing Officer was whether the NEC's conditional approval of the Permits should be confirmed. The Hearing Officer considered whether the NEC's decisions accorded with the Niagara Escarpment Plan ("NEP") and the Official Plans of the Region of Halton and the Town of Halton Hills (the "Town").

The Hearing Officer considered the Appellants' argument that the noise from the sound system at the equestrian events would disturb the neighbours' natural enjoyment of their residences. The Hearing Officer found that the issue of noise emanating from the sound system at the Site was a matter under the jurisdiction of the Town and its noise by-law.

The Hearing Officer also considered the impact of the proposed equestrian events on the safety of pedestrians on Regional Road 25 and 15 Side Road. He found that not all of the increased traffic and parking on these roads could be attributed to the events proposed by the Applicant. Further, the

Hearing Officer noted that in the absence of a traffic study, there was insufficient information to warrant overturning the NEC's approvals.

On the issue of whether a dog agility show qualified as "agricultural-related tourism" within the meaning of section 100(21)(c) of the Halton Regional Official Plan, the Hearing Officer found it compelling that the organization sponsoring the show, the Agility Association of Canada, reported to the federal Department of Agriculture. The Hearing Officer noted as well, that the staff of Halton Region held the opinion that the dog agility show was an "agricultural event". The Hearing Officer found that the proposed equestrian events were clearly within the scope of an animal husbandry and/or agricultural use.

The Hearing Officer also considered whether the Applicant's contravention of Condition 8 of the Permits' Conditions of Approval, rendered the Permits void. Citing *Rehak v. NEC*, January 25, 2007 (Case No.: 06-051), the Hearing Officer found that issues related to the enforcement of permit conditions were within the jurisdiction of the NEC, and not within a Hearing Officer's purview.

The Hearing Officer confirmed the NEC's decision to approve conditionally each of the three Development Permits pursuant to section 25(12) of the *NEDPA*.

Decision released: August 10, 2007 (Case No.: 07-039/07-046/07-049)

Rauchfleisz v. Niagara Escarpment Commission (Decision)

Mark and Mary Rauchfleisz ("Appellants") filed for a Hearing pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") to appeal a Development Permit application (the "Permit") conditionally approved by the Niagara Escarpment Commission ("NEC"). The Permit would allow Tony and Julie Emond ("Applicants") to construct a dwelling with a private sewage disposal system, a well, and a driveway, on an existing lot in the Municipality of Northern Bruce Peninsula, Bruce County, Ontario. The Appellants owned the property immediately north of the subject property.

The Applicants filed a request that the appeal be dismissed pursuant to section 25(8.1) of the *NEPDA*. In its Order in *Rauchfleisz v. Niagara Escarpment Commission*, ((NEHO Case Nos.: 07-028/07-029) dated July 12, 2007, the NEHO denied that request.

At a Pre-Hearing Conference Paula Blagrave requested Party status for herself and her husband, Kerry Blagrave. The Hearing Officer found that since the Blagraves were co-owners of the subject property with the Emonds, their interests were directly affected by the proceeding.

As a result of discussions held between the Parties during the same Pre-hearing Conference, the Appellants indicated that they were satisfied their concerns had been met, and that they were withdrawing their appeal. All of the Parties agreed that the responsibility for tending to the state of disrepair of the drainage culverts rested with the Municipality of Northern Bruce Peninsula. The Parties further agreed that they would work to secure the Municipality's co-operation to repair/remove the existing culverts.

The Hearing Officer accepted the Appellants' withdrawal and confirmed the NEC's decision to conditionally approve the Development Permit application.

Decision released: July 16, 2007 (Case Nos.: 07-028/07-029)

Rehak v. Niagara Escarpment Commission (Decision)

Linda Rehak ("Appellant"), appealed a decision of the Niagara Escarpment Commission ("NEC") to issue a Development Permit (the "Permit") to Carlo Zanon ("Applicant") with eight conditions. The Permit allowed the Applicant to construct a one storey detached garage for vehicles and personal storage, on an existing lot located on Part Lot 21, Concession 2, in the Town of Lincoln, Region of Niagara. The Appellant, who was the Applicant's adjacent neighbour to the east, objected to the Permit on the following grounds: the proposed garage would block her view of Lake Ontario; the location of the garage in the Applicant's front yard would set a bad precedent for the neighbourhood and destroy its rural character; the size and location of the garage would negatively impact the value of her property.

The first issue considered by the Hearing Officer was whether the NEC's decision to conditionally approve the Permit should be confirmed. The Hearing Officer noted that the Town of Lincoln and the Region of Niagara had no objections to the Permit. With regard to the Appellant's concern that the garage would obstruct her view of the Escarpment, the Hearing Officer found that there was insufficient evidence to support a finding one way or the other. The Hearing Officer found also that as an accessory building, the garage was a permitted use under sections 1.3 (Escarpment Natural Area) and 1.4 (Escarpment Protection Area) of the Niagara Escarpment Plan. In terms of the location of the garage, the Hearing Officer found that Condition #5 of the Permit, requiring that the garage be built 20.7m (68 ft) from the property line, complied with the front yard setback requirements of the Town of Lincoln, but that in so doing, it encroached on an already installed septic system. The Hearing Officer found that on that basis alone, there was an impediment to confirming the Permit.

The Hearing Officer also found that the Permit did not accord with sections 2.2.1(a) and 2.2.4 of the NEP. Since there were no other front yard garages in the neighbourhood, the proposed garage would interrupt the continuous, open rural character of the neighbourhood and disturb the visual attractiveness of the Escarpment.

The Hearing Officer considered whether she had the jurisdiction to make a decision on the Applicant's new proposal to build the garage with a setback of 9.8m (32 ft) from the front property line. The Hearing Officer found that since the Parties did not agree to the revised setback as a term and condition of the Permit, the criterion for deemed confirmation under section 25(12.1)(b) of the *Niagara Escarpment Development Act* had not been fulfilled, and she did not, therefore, have the jurisdiction to consider the substantially revised proposal. The Hearing Officer found that making a decision on the proposal to change the front yard setback, would, in effect, remove the rights of other commenting agencies to be informed and comment on the proposal. It would also remove the rights of neighbours to be advised of the Permit and to appeal it. The Hearing Officer found that she could not pursue a course of action that would abrogate the rights conferred on and by the NEC.

The Hearing Officer found that NEC's to conditionally approve the Permit was not correct, and recommended that the Minister not approve the Permit. The Minister did not concur with the Hearing Officer, and on February 6, 2008, the Minister directed the NEC to issue a Development Permit application with one additional condition.

Decision released: April 12, 2007 (Case No.: 06-051)

Renchko and Hunter v. Niagara Escarpment Commission (Order)

The Chippewas of Nawash Unceded First Nation requested permission to submit further legal authorities five months after the conclusion of a Hearing of the Niagara Escarpment Hearing Office. The documents were *Re UR Energy Inc. Screech Lake Uranium Exploration Project* (May 7, 2007), EA 0607-003 (Mackenzie Valley Environmental Impact Review Board), and the *Report of the Ipperwash Inquiry*, May 31, 2007.

The Hearing Officers concurred with the basic principle that if the documents were case law, and if they indicated the applicable law had changed between the time of final argument and the issuance of the decision, the Hearing Officers could consider them with or without seeking further submission from the Parties.

The Hearing Officers found that the documents were reports that made recommendations under a different regulatory context, and were neither judicial nor quasi-judicial decisions. The Hearing Officers commented that they could not anticipate whether, or how the Ontario government might further implement the recommendations in the *Report of the Ipperwash Inquiry.* Since neither report qualified as a legal authority or as case law, the Hearing Officers found that they did not warrant consideration. Accordingly, the Hearing Officers denied the request made by the Chippewas of Nawash.

Order released: July 3, 2007 (Case Nos.: 05-094/05-095/05-096/05-097)

Stacey v. Niagara Escarpment Commission (Decision)

Duncan Stacey ("Appellant") filed an appeal of a decision of the Niagara Escarpment Commission ("NEC") to issue a Development Permit subject to 21 conditions of approval (the "CofA") to Armour Self Storage Inc. ("Armour"). The Development Permit allowed Armour to construct six buildings on a portion of its property for the purpose of operating a commercial self-storage facility. At a prehearing conference, the Parties indicated their intention to resolve the appeal through a mutually agreeable revision to the CofA.

The Hearing Office considered whether the NEC's decision to conditionally approve Armour's application, amended to include terms and conditions agreeable to the Parties, was correct and should not be changed. The Parties agreed that an amendment to Condition 19 of the CofA that required Armour to seek the approval of the NEC, and consult the Town of Halton Hills and the Ministry of Transportation before installing a sign or advertising along Highway 7, would satisfactorily settle their dispute.

The Hearing Officer found that the revised CofA complied with subsection 25(12.1) of the *Niagara Escarpment Planning and Development Act.* The NEC's decision was confirmed.

Decision released: September 12, 2007 (Case No.: 07-006)

Szabo v. Niagara Escarpment Commission (Decision)

Monica A. Szabo ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to the Niagara Escarpment Hearing Office pursuant to section 25(8) of the *Niagara Escarpment Development Act* ("*NEPDA*"). The NEC decision had conditionally approved a Development Permit application filed by Boris Dinevski ("Applicant") to construct a two-storey, single dwelling, a new septic system and a new driveway on an existing lot located on Part Lot 9, Concession 6, in the City of Burlington (the "Site").

The Appellant, who resided on Appleby Line opposite the Site, was concerned that the installation of the proposed driveway access near the entrance of her own driveway might cause traffic problems. The Appellant also questioned whether the proposed development might disrupt the groundwater flow to her well, and/or alter surface water flow in the immediate area which could further exacerbate existing drainage problems on her property. At the Pre-Hearing Conference held by teleconference, the Parties indicated that they intended to resolve the appeal through a mutually agreeable revision to Condition 10 of the NEC's Conditions of Approval. The revision would require the driveway to be set back 10 metres from an existing woodlot at the Site.

The Hearing Officer considered whether the revised Development Permit complied with subsection 25(12.1) of the *NEPDA* and found that it did. The Hearing Officer found that that NEC's decision to conditionally approve the application for the Development Permit, amended to include terms and conditions agreeable to the Parties, was correct, and should not be changed. The NEC's decision was, therefore, confirmed.

Decision released: February 28, 2008 (Case No.: 07-102)

Waugh v. Niagara Escarpment Commission (Decision)

Eric Waugh, Philip Caetano, Brian Evans, Catherine Gill, Janet and Randy Nagy and Marueen Thomson ("Appellants"), appealed a decision of the Niagara Escarpment Commission ("NEC") to the Niagara Escarpment Hearing Office ("NEHO") pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"). The NEC decision had conditionally approved a Development Permit application made by Louis Agro ("Applicant") to construct two buildings associated with a mushroom farm located on Part Lot 14, Concession 2, in the City of Hamilton (the "Site").

The Appellants were concerned that the proposed buildings, which would contain additional rooms for growing, packing and storing mushrooms, would create odour, truck traffic, water contamination, noise, and disturbances created by evening and night-time business operations. At the request of the Parties, the NEHO granted an adjournment so that they could discuss a possible

resolution to the issues in dispute. The Parties provided the NEHO with agreed upon revised Conditions of Approval and related Notes, and informed the Hearing Officer that the agreement was based on the Conditions set out in an earlier NEHO decision relating to a different mushroom farm adjacent to the Site.

The Hearing Officer found that the revised and new Conditions of Approval satisfied section 25(12.1) of the *NEPDA*. The Hearing Officer, therefore, confirmed the NEC's decision to conditionally approve the Development Permit.

Decision released: February 13, 2008 (Case Nos.: 07-056/07-073 to 07-078)

Zarifis v. Niagara Escarpment Commission (Decision)

Nikolaos and Christie Zarifis (the "Appellants") appealed pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), a decision of the Niagara Escarpment Commission ("NEC"). The decision had been to conditionally approve a Development Permit application by Mel and Lynn Radake ("Applicants") to make several renovations to their home. The Parties agreed to add a new condition that would introduce a landscaping plan designed to mitigate visual effects of the proposed development. They also agreed to add a condition that would clarify the limit of any new extension to the home. The Hearing Officer concluded that the proposed amendment to the conditions addressed the concerns of the Appellants and complied with the requirements of the NEP.

Pursuant to section 25(12.1) of the *NEPDA*, the NEC's conditional approval of the application for a Development Permit with revised conditions, was confirmed.

Decision released: October 11, 2007 (Case Nos.: 07-058/07-059)

Ontario Water Resources Act

Crest Centre (Meadowcrest) Inc. v. Director, Ministry of the Environment (Order)

Crest Centre (Meadowcrest) Inc. ("Appellant") filed an appeal of an Amended Certificate of Approval (Municipal and Private Sewage Works) ("Amended CofA") issued by the Director, Ministry of the Environment ("MOE") pursuant to section 53 of the *Ontario Water Resources Act* ("*OWRA*"). At a Preliminary Hearing, the Appellant raised the issue of whether the Director had acted within his jurisdiction when he issued the Amended CofA. The Parties and the Tribunal agreed to continue the Preliminary Hearing after the Appellant had provided written submissions on this issue.

In its submissions, the Appellant raised four jurisdictional issues. The first considered by the Tribunal was whether section 53(4) of the *OWRA*, and in particular, the words "in the public interest", was unconstitutionally vague, violating section 7 of the *Constitution Act, 1982 (Part 1: Canadian Charter of Rights and Freedoms)* (the "*Charter*"). The Tribunal first considered whether it had the jurisdiction to determine the *Charter* issue. It found that section 102.3(1) of the *OWRA*

gave it the jurisdiction to determine issues of law, and therefore the Tribunal had the jurisdiction to consider *Charter* issues. The Tribunal noted that neither Party had brought forward any indication that the wording of the *OWRA* revealed an intention to prohibit the Tribunal from addressing *Charter* issues.

The Tribunal noted that it would follow the directions of the Supreme Court of Canada, and determine whether the use of the phrase "the public interest" in section 53(4) of the *OWRA* was unconstitutionally vague by considering it in its specific legislative context.

The Tribunal found that the limit placed on the Director's discretion under section 53(4) of the *OWRA* was not vague since what a Director could do in the "public interest" was clearly constrained by the environmental purpose of the statute. The Tribunal noted that if the Director attempted to use the veil of the public interest to carry out an action for an improper purpose, then the Tribunal or the courts could correct that action.

The Tribunal found that the Appellant had focused its *Charter* challenge on the wrong target, and that it would have been more appropriate for it to allege that the terms of the Amended CofA issued under section 53(4) were vague, rather than the wording of section 53(4) itself. The Tribunal explained that section 53(4) stated clearly that it was a failure to comply with the conditions contained in a Director's CofA that could lead to penal consequences. The Tribunal noted that where this occurred, a person could take advantage of the general right of review under section 100 of the *OWRA* or the rights of appeal available under section 9 of the *OWRA*.

The second issue considered by the Tribunal was whether the Director had issued the Amended CofA without authority because the Director had not articulated reasons for its issuance. The Tribunal found that the Director's reasons for issuing the Amended CofA satisfied the applicable statutory and administrative law standards, and did not amount to a jurisdictional error capable of voiding the Amended CofA.

The third and fourth issues considered by the Tribunal related to whether the Director had issued the Amended CofA without authority because the Appellant had not applied for it, or because section 53(4) of the *OWRA* did not allow the Director to revoke and replace a CofA at the same time. The Tribunal found section 53 of the *OWRA* gave the Director the authority to revoke and replace a CofA, and that it would be contrary to the purpose of the *OWRA* to require an application each time the Director wished to update a CofA.

The Tribunal denied the Motion to revoke the Amended CofA.

Order released: May 24, 2007 (Case No.: 06-052)

Crest Centre (Meadowcrest) Inc. v. Director, Ministry of the Environment (Decision)

Crest Centre (Meadowcrest) Inc. ("Appellant") filed an appeal of an Amended Certificate of Approval (Municipal and Private Sewage Works) ("Amended CofA") issued by the Director, Ministry of the Environment ("MOE") pursuant to section 53 of the *Ontario Water Resources Act.*

Further background to this decision is set out in the summary of the Order by the same name, located above.

The Parties reached a settlement regarding the issues between them, and provided their Settlement Agreement to the Tribunal. The Parties also requested that the Tribunal amend several portions of the Amended CofA. The Tribunal found that the proposed changes to the Amended CofA would provide greater clarity to any member of the public interested in the Amended CofA. The Tribunal found that, in accordance with Rule 181, the Settlement Agreement was consistent with the purpose and provisions of the relevant legislation and the public interest. The Tribunal, therefore, accepted the Settlement Agreement, ordered that the Amended CofA be revised to reflect the proposed changes set out in the Settlement Agreement, and dismissed the appeal.

Decision released: October 3, 2007 (Case No.: 06-052)

CVRD Inco Limited v. Director, Ministry of the Environment (Decision)

CVRD Inco Limited ("Appellant") sought an appeal under section 100 of the *Ontario Water Resources Act* ("*OWRA*"), of a Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment under section 53 of the *OWRA*. The CofA related to proposed upgrades to the existing sanitary sewage treatment works serving the Coleman Mine Surface Plants/Buildings located at Colemen/McCreedy Mine, Lot 3 Concession 4, in the City of Greater Sudbury.

The Parties reached a Settlement Agreement that included the terms of a proposed Amended Certificate of Approval (Amended CofA). The Tribunal considered whether the Settlement Agreement was consistent with the provisions of the *OWRA*, and whether the Amended CofA accorded with the public interest. The Tribunal found that the additional sewage treatment measures outlined in the Amended CofA, including a reservoir and water treatment system, indicated that the proposed settlement was consistent with the *OWRA* and in the public interest. Accordingly, the Tribunal accepted the Settlement Agreement and dismissed the appeal.

Decision released: July 24, 2007 (Case No.: 07-001)

Davidson v. Director, Ministry of the Environment (Decision)

Jesse Davidson ("Appellant") filed for a Hearing before the Tribunal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"). Under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), the Tribunal had earlier granted the Appellant Leave to Appeal a Permit to Take Water ("PTTW") issued to Aquafarms 93, by the Director, Ministry of the Environment under section 34 of the *OWRA*. The PTTW allowed Aquafarms 93 to bottle water for commercial purposes from three wells located at Lot 20, Concession 13, in the Municipality of Grey Highlands.

The Parties engaged in mediation conducted by a Vice-Chair of the Tribunal. The mediation resulted in an agreement to amend certain provisions of the PTTW and the Tribunal considered whether the written Minutes of Settlement (the "Minutes") accorded with Rule 181 of the Tribunal's Rules of Practice. The Tribunal found that the amendments to the PTTW proposed

within the Minutes, and the detailed agreement for a more extensive monitoring program, provided a better understanding of the nature and impact of the water taking. The Tribunal also found that the reduction of the term of the PTTW to five years would allow sufficient time to implement the suggested monitoring program, and would enhance the reliability of the interpretation of the data. Further, the Tribunal found that the Minutes contained a recognition that the ecological health of the river should be assessed as part of the overall evaluation of the water taking. In summary, the Tribunal found that the agreement was consistent with the purpose and provisions of the relevant legislation and was in the public interest. Accordingly, the Tribunal accepted the agreement and dismissed the appeal.

Decision released: June 12, 2007 (Case No.: 06-105)

Magna Structural Systems Inc. v. Director, Ministry of the Environment (Decision)

Magna Structural Systems Inc. and MI Developments Inc. ("Appellants") appealed an Amended Certificate of Approval, Industrial Sewage Works ("Amended CofA") pursuant to section 100 of the *Ontario Water Resources Act*. The Amended CofA concerned the stormwater management system associated with the Appellants' automotive parts manufacturing facility located in Milton, Ontario. The facility discharged treated water into Sixteen Mile Creek.

Subsequent to the Preliminary Hearing, Counsel for the Director and Counsel for the Appellants notified the Tribunal that they had finalized a Settlement Agreement. The Tribunal considered whether the Settlement Agreement was consistent with the purpose and provisions of the relevant legislation and was in the public interest under Rule 193 of the Tribunal's Rules of Practice. The Tribunal found that the Amended CofA provided for the protection of the environment by including provisions that would ensure that the Appellants' would comply with the MOE's effluent quality requirements, and by requiring the Appellants to keep detailed records and undertake performance evaluations. The Tribunal also found that there was no evidence that the Settlement Agreement was inconsistent with the public interest. Accordingly, the Tribunal accepted the Settlement Agreement, including the Amended CofA, and dismissed the appeal.

Decision released: January 18, 2008 (Case No.: 07-064/07-065)

Municipality of North Perth v. Director, Ministry of Environment (Decision)

The Municipality of North Perth (the "Municipality") filed an appeal of a Certificate of Approval ("CofA") that the Ministry of Environment ("MOE") had granted to Wallaceview Developments Ltd. under section 53 of the *Ontario Water Resources Act* ("*OWRA*"). The CofA was for the establishment of Storm Water Management Works to service Wallaceveiw Estates Phase II, a subdivision located in North Perth Town. The Municipality appealed the CofA on the grounds that its provisions relating to groundwater monitoring and recording were excessive and unwarranted.

The issue before the Tribunal was whether the Municipality had standing to require a hearing respecting the CofA, under section 100(4) of the *OWRA*.

The Tribunal found that neither the Municipality's interest in the CofA because it affected the Municipality's infrastructure, nor its signed Declaration on the application form for the CofA, were sufficient to qualify the Municipality as an applicant under section 100(4) of the *OWRA*. The Tribunal found that in order to qualify as an applicant under that section, a person must be either the person who applied for the CofA, or the person who had been granted the CofA.

Accordingly, the Tribunal dismissed the Municipality's appeal.

Decision released: April 11, 2007 (Case No.: 06-139)

Rapski v. Director, Ministry of the Environment (Decision)

John Rapski ("Appellant") filed an appeal of a Draft Director's Order (the "Draft Order") of the Director, Ministry of the Environment ("MOE"). The Draft Order, made under section 34(7) of the *Ontario Water Resources Act* ("*OWRA*"), required Marcel Guilbeault to prepare and submit a report for the approval of the Director on proposed measures to be taken to re-establish a water supply to the affected well on property owned by the Appellant, located at 230 Grenfell Road, in the District of Temiskaming, Ontario. On June 29, 2007 the Draft Order was posted on the Environmental Registry, pursuant to section 22(1) of the *Environmental Bill of Rights, 1993* ("*EBR*").

The Appellant alleged that the Director had decided not to enforce the Draft Order against Mr. Guilbeault, and the Appellant sought to appeal that decision. The issue before the Tribunal was whether the Tribunal had the jurisdiction to consider the Appellant's Notice of Appeal. The Tribunal granted a number of extensions to the Appellant to enable his lawyer to file submissions on the issue, however, no submissions were filed.

First, the Tribunal found that the *OWRA* does not provide anyone with a right to appeal a Draft Order. Section 100 of the *OWRA* affords a substantive right of appeal only to a person to whom a Director's Order has been issued. In this case, if a Director's Order had been issued, it would have been to Mr. Guilbeault, and he would have had a right of appeal under section 100 of the *OWRA*, not the Appellant. Second, the Tribunal found that neither the Appellant, nor anyone else could file an application for Leave to Appeal the Draft Order under the *EBR*. Section 38 of the *EBR* requires that an application for Leave to Appeal be made in respect of a decision, and in this case, it remained to be seen whether the Director's Order would be issued.

Accordingly, the Tribunal dismissed the appeal.

Decision released: November 14, 2007 (Case No.: 07-089)

Waste Management of Canada Corporation v. Director, Ministry of the Environment (Decision)

Waste Management of Canada Corporation ("Waste Management") appealed a decision of the Director, Ministry of the Environment, to issue a Revocation of Certificate of Approval (Industrial

Sewage Works) (the "Revocation Notice") pursuant to section 53(4)(e) of the *Ontario Water Resources Act* ("*OWRA*"). The revoked Certificate of Approval had approved the establishment of a clay-lined detention pond for the collection and treatment of stormwater runoff from the Blackwell Road Landfill near the City of Sarnia (the "Site").

In June 2007, Antonio Fracalanza, a landowner adjacent to the Site requested Participant status in the appeal. The Tribunal advised him to attend the Preliminary Hearing and request status at that time. Later in June of 2007, the Tribunal issued an Order granting Waste Management's Motion for a stay, and in September 2007, the Tribunal issued an Order extending the stay on consent. In October 2007 the Tribunal granted the Parties' request for a further adjournment of the Preliminary Hearing while the Parties were engaged in settlement discussions. In January 2008, Counsel for the Director notified the Tribunal that the Parties had come to a Settlement Agreement. The Tribunal requested the Parties provide that copy of the Settlement Agreement and advise the Tribunal whether the decision under appeal was altered, and if so, whether it was in the public interest. In February 2008, Waste Management wrote to the Tribunal withdrawing its appeal. After receiving submissions from the Parties on the relevance of the materials that Mr. Fracalanza had provided to the Tribunal, the Tribunal found that Mr. Facalanza did not have any formal status before the Tribunal, and that a number of the issues he raised would have been outside the jurisdiction of the Tribunal at the Hearing of the appeal.

The issue before the Tribunal was whether the Settlement Agreement, which resulted in the issuance of a new Certificate of Approval ("the "New CofA"), was consistent with the purpose and provisions of the *OWRA*, and was in the public interest under Rule 193 of the Tribunal's Rules of Practice. The Tribunal found that provisions in the New CofA requiring Waste Management to monitor the sewage works and prepare contingency and remedial action plans, as well as other requirements, set out a regime that met the environmental protection purpose of the *OWRA* and were in the public interest. Accordingly, the Tribunal accepted the withdrawal of the appeal and the Settlement Agreement, and dismissed the appeal.

Decision released: March 7, 2008 (Case No.: 06-199)

Safe Drinking Water Act

Ontario Clean Water Agency v. Director, Ministry of the Environment (Decision)

In this decision, the Tribunal accepted a withdrawal of an appeal commenced under section 129 of the *Safe Drinking Water Act, 2002* ("*SDWA*"). Ontario Clean Water Agency ("Appellant") appealed an Order issued by the Director, Ministry of the Environment ("MOE") under section 107 of the *SDWA*, requiring the Appellant to not cause or permit unchlorinated water to enter the distribution system at the Shelburne Drinking Water System (the "Facility"), located in Shelburne, Ontario.

The MOE alleged, and the Appellant denied, that on November 18, 2006, untreated water had been directed into the Facility's water distribution system. The Appellant argued that since this event

had not occurred, there was no violation of the relevant legislation on which the Director based its authority for issuing the Order.

Following a Preliminary Hearing, the Appellant made a request to withdraw its appeal. The Tribunal considered whether to accept the withdrawal pursuant to Rule 179 of the Tribunal's Rules of Practice. Since all the Parties consented to the withdrawal, and there was no settlement agreement altering the Order, the Tribunal accepted the Appellant's withdrawal of its appeal and dismissed the proceeding.

Decision released: May 28, 2007 (Case No.: 06-190)

Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal

Trent Talbot River Property Owners's Association, Marchand Lamarre and Jodi McIntosh v. Director, Ministry, of the Environment (Decision)

The Minister of the Environment ("Minister") received two appeals of a Decision of the Tribunal upholding the issuance of a Permit to Take Water (PTTW), and an associated Certificate of Approval (Sewage) ("CofA"), for the operation of a limestone quarry on the Carden Plain, near Brechin. One appellant, Trent Talbot River Property Owner's Association (the "Association") asked that the PTTW be revoked. The other Appellants, Marchand Lamarre and Jodi McIntosh ("Lamarre/McIntosh") asked that in the alternative, the Permit Holder be required to purchase their property, or in the further alternative, that the PTTW conditions be modified.

During the course of the proceedings, section 144 of the *Environmental Protection Act* ("*EPA*"), the provision setting out the right to appeal a decision or order of the Tribunal, was repealed and replaced with section 145.6(2). Similarly, section 102.3(2) was added to the *Ontario Water Resources Act* ("*OWRA*"), setting out the Minister's powers in a written appeal of a decision of the Tribunal. The Minister considered whether these legislative changes had affected his powers, and stated that under either section 145.6(2) of the *EPA*, or section 102.3(2) of the *OWRA*, he could confirm, alter or revoke a decision of the Tribunal in the public interest, on any matter other than a question of law.

The Minister first considered the Lamarre/McIntosh request for further modifications to the PTTW. She found that while the PTTW attempted to satisfy a "fair sharing" approach to the conservation, protection and wise use management of Ontario's waters, some uncertainties remained with regard to how the PTTW's conditions would be put into practice. The Minister agreed with the Tribunal's finding that the quarrying activities associated with the PTTW would impact the Lamarre/McIntosh wells. The Minister expressed the additional concern that the quarrying activity would affect the drinking water of Lamarre/McIntosh, and on this basis, she refused to uphold the issuance of the PTTW. Accordingly the Minister allowed Lamaree/McIntosh's appeal.

The Minister remarked that it might not be necessary for her to deal with the Association's appeal after having allowed the Lamarre/McIntosh appeal. But, given the time and energy already invested in the appeals, the Minister decided to address the Association's submissions. These focused on the flow impacts caused by the fact that the proposed quarry would be located in a fractured rock setting. The Minister noted that the Tribunal had considered all of the evidence relating to the geology at the site of the proposed quarry, and had concluded that the testing performed to date, in conjunction with the monitoring conditions of the PTTW, was sufficient. The Minister stated that she was not willing to interfere with the Tribunal's general conclusions based on this evidence. Accordingly, she dismissed the Association's appeal, though she noted that if she had not allowed the Lamarre/McIntosh appeal, she would have added a condition to further strengthen the PTTW's ability to deal with any unanticipated consequences of the quarry, and to

further acknowledge the difficulties inherent in operating a lime-stone quarry within a fractured rock setting.

Decision released: July 23, 2007 (Case No.: 02-214)

Report on Performance Measures
Fiscal Year 2007-2008

For fiscal year 2007-2008, the Tribunal adopted nine goals that are critical to the effective and efficient performance and service quality of the Tribunal's main functions.

In this fiscal year, the Tribunal met or exceeded the performance measures in all nine targeted areas. The Key Performance Goals and Objectives for the next fiscal year 2008-2009 are set out in Appendix D.

Commitment #1: Courtesy

"Tribunal members are committed to ensuring that all parties are treated with courtesy and respect when appearing before the Tribunal at a hearing."

In order to monitor the performance of Tribunal Members, the Tribunal sends out questionnaires after every mediation and hearing. These questionnaires provide feedback and assist the Tribunal in improving the hearing process. The questionnaires include questions relating explicitly to the conduct and performance of the Tribunal Members during the hearing process. This fiscal year, the number of questionnaires received by the Tribunal has increased. Of those questionnaires completed, 95% reported satisfaction with Member courtesy. The relatively low number of questionnaires received may be due to the parties choosing not to respond as they appear regularly appear before the Tribunal or Hearing Office.

The Tribunal has a formal policy and process for complaints received from the parties or the public concerning its Members. The Tribunal received and resolved one complaint during this fiscal year, and also resolved one complaint which had been carried over from the previous fiscal year.

Commitment #2: Decisions

"Tribunal members will render timely decisions."

Legislation requires that all recommendations/decisions made under the *Niagara Escarpment Planning and Development Act* on appeals regarding development permit applications be issued within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Of the total cases carried forward and received this fiscal year under the *Niagara Escarpment Planning and Development Act* that resulted in a hearing and a decision, 95% of the decisions were rendered within 30 days of the completion of the hearing. Only 4% of all decisions rendered were released more than 30 days following the hearing.

Niagara Escarpment Plan amendment application decisions must be rendered not more than 60 days after the conclusion of the hearing or within such extended time as the Niagara Escarpment Commission may specify. During this fiscal, the Niagara Escarpment Hearing Office did not receive any plan amendment applications.

Tribunal decisions regarding the *Environmental Bill of Rights, 1993* leave to appeal applications are to be made within 30 days after the day on which the application is filed, unless the Tribunal has determined that, because of unusual circumstances, a longer period is needed.

In all other types of decisions, Tribunal members endeavour to render 80% of their decisions within 60 days of the completion of the hearing or the filing of final written submissions (if ordered by the hearing panel).

For the purposes of this performance measure, the commitment was defined as *"80% of all Decisions will be rendered within 60 days of final argument, excepting hearings with legislative timelines."* For the fiscal year 2007-2008, the timeliness of decisions rendered was captured for those decisions issued on appeals under the *Environmental Protection Act,* the *Ontario Water Resources Act,* and the *Safe Drinking Water Act, 2002*. There were no applications under the *Environmental Assessment Act,* the *Environmental Protection Act* and the *Ontario Water Resources Act*. In this fiscal, the Tribunal Members released their decisions within 60 days of the final argument in 100% of the decisions issued for these cases. The Tribunal Members and staff work towards a timely decision release process. Tribunal staff will continue to monitor and regularly remind Members of the timelines for releasing their decisions. The Tribunal remains committed to timely decisions.

Commitment #3: Training of Members

"The Tribunal will provide training for its Members."

New Members are trained in the hearing process, conduct of hearings, knowledge of legislation, Tribunal Rules and decision-writing. They receive one-on-one training regarding the hearing process, legislation, conduct of hearings, the Tribunal Rules and Practice Directions and decision writing from in-house staff. Members attend training courses on adjudication and decision-writing conducted by the Society of Ontario Adjudicators and Regulators. Vice-Chairs also attend the five-day course on alternative dispute resolution offered by Stitt, Feld, Handy. All Members attend hearings, first as an observer, and then as a member of a hearing panel before conducting hearings independently.

In the last fiscal year, one full-time Vice-Chair was appointed as a part-time Member and on Vice-Chair and three part-time Members were appointed to the Tribunal. The newly appointed Vice-Chair was conducting hearings independently within the first two months of his appointment. The Tribunal strengthened its training for Members and included four in-house sessions on legislation, review of Rules, policies and process in its Learning Programs. The Tribunal will continue to provide in-house training as part of its Learning Programs in the next fiscal year. The Learning Programs are outlined in Appendix C.

Commitment #4: Offer pre-hearing conferences and preliminary hearings

"The Tribunal will offer pre-hearing conferences in appeals under the Niagara Escarpment Planning and Development Act and schedule preliminary hearings in all other appeals and applications, prior to the commencement of the hearing."

The Tribunal is committed to providing pre-hearing conferences for matters under the *Niagara Escarpment Planning and Development Act* (*NEPDA*) and preliminary hearings for all other appeals and applications. The pre-hearing conferences were held via teleconference and preliminary hearings were held at least 30 days prior to the commencement of the hearing.

Twenty-eight pre-hearing conference days and 39 preliminary hearing days were held during this last fiscal year. The Tribunal will continue to offer pre-hearing conferences for *NEPDA* matters and provide preliminary hearings for all other matters. However, pre-hearing conferences are not mandatory and can only be held if the parties agree to participate.

At pre-hearing conferences, the Hearing Officers inquire whether Parties have had an opportunity to discuss the issues in efforts to settle the matter. During this fiscal, 24 cases were settled at the pre-hearing conference stage out of 64 cases where pre-hearing conferences were held. Two of the 64 cases are still on-going.

Commitment #5: Appeals and Judicial Reviews of Tribunal Decisions

"Report on Appeals and Judicial Reviews of Tribunal Decisions."

The Tribunal has committed to reporting on the outcome of any appeals or judicial review applications of its decisions. This fiscal year, the Tribunal received a decision of the Minister and has reported on that decision in this Annual Report under Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal.

Commitment #6: Timeliness in Scheduling Hearings

"Improve the timeliness in scheduling hearings."

The Tribunal has adopted a standard to issue a Notice of Hearing within 30 calendar days of the date of receipt of the appeal. During this fiscal year, the Tribunal exceeded that target, as the average time to issue a Notice of Hearing from the date of the receipt of the appeal was 20 days.

During this fiscal year, the staff also exceeded the scheduling expectation. On average, hearings were scheduled three calendar days after receipt of all required information, which exceeds our performance target of seven calendar days.

Commitment #7: Mediation Services

"*Offer mediation services in all appeal cases, where appropriate, and on request in application cases, prior to the commencement of the hearing.*"

Mediation services are available to all parties in matters before the Tribunal. The Tribunal formally offers these services in every appeal (except in matters filed under the *Niagara Escarpment Planning and Development Act*) and, upon request, in all applications in order to encourage parties to resolve their issues. In this fiscal year, parties participated in mediations during the hearing process in 5 cases compared to 9 cases last fiscal year. Of the 5 cases where mediation took place, two cases were settled, one case was withdrawn and two cases are still ongoing.

These statistics indicate that the Tribunal mediation services are successful in resolving issues, narrowing the scope of those issues proceeding to a hearing and in reducing hearing time and costs for both the public and the government.

Tribunal members who conducted mediation sessions were certified through an accredited course. Questionnaires are regularly sent to parties after each mediation session to obtain feedback on the Tribunal's performance. Of the responses received, 100% expressed overall satisfaction with the mediation process.

Commitment #8: Website Access

"The Tribunal will use its website to communicate with its clients."

The website is the primary way to access copies of Orders and Decisions and information about the Tribunal and its processes. From April 1, 2007 to March 31, 2008, the Tribunal had a total of 33,028 visitors to its site and a total of 716,794 "hits" on specific pages in the site. One decision of the Tribunal was downloaded almost 700 times. The Tribunal's Annual Reports were downloaded over 10,000 times. Copies of the Tribunal's Rules of Practice and Practice Directions, were downloaded over 5,000 times; the Guides, over 3,000 times and the Business Plan, over 2,000 times. During the year, there was a total of 291,225 downloads of documents from its website, including approximately 269,510 downloads of Tribunal Decisions and Orders. "Webtrends" is used to monitor the Tribunal's statistics. See Appendix E for a list of the most popular downloads.

The staff has made a commitment to update the website within 24 hours of receiving a change. However, during this fiscal year, the Tribunal's information and technology support was transferred to the Justice Cluster as part of the Tribunal's co-location. If the Tribunal experiences difficulties with its website, the resolution to correct the website, update or provide access to the public will be delayed.

Through access to the website, the Tribunal continues to ensure that the public has access to the most current documents available. Decisions and Orders, Rules of Practice and Practice Directions, as well as the current published Annual Report, Business Plan and Guides are posted.

The Tribunal has been working to post decisions that have not been previously posted. In this fiscal year, all decisions of the Office of Consolidated Hearings were posted on the website.

The number of visitors to the Tribunal's website continues to increase. The Tribunal continues to review and make changes to its website to provide the public with more comprehensive access to information, Decisions and Orders of the Tribunal.

Commitment #9: Guides

"Guides will be updated."

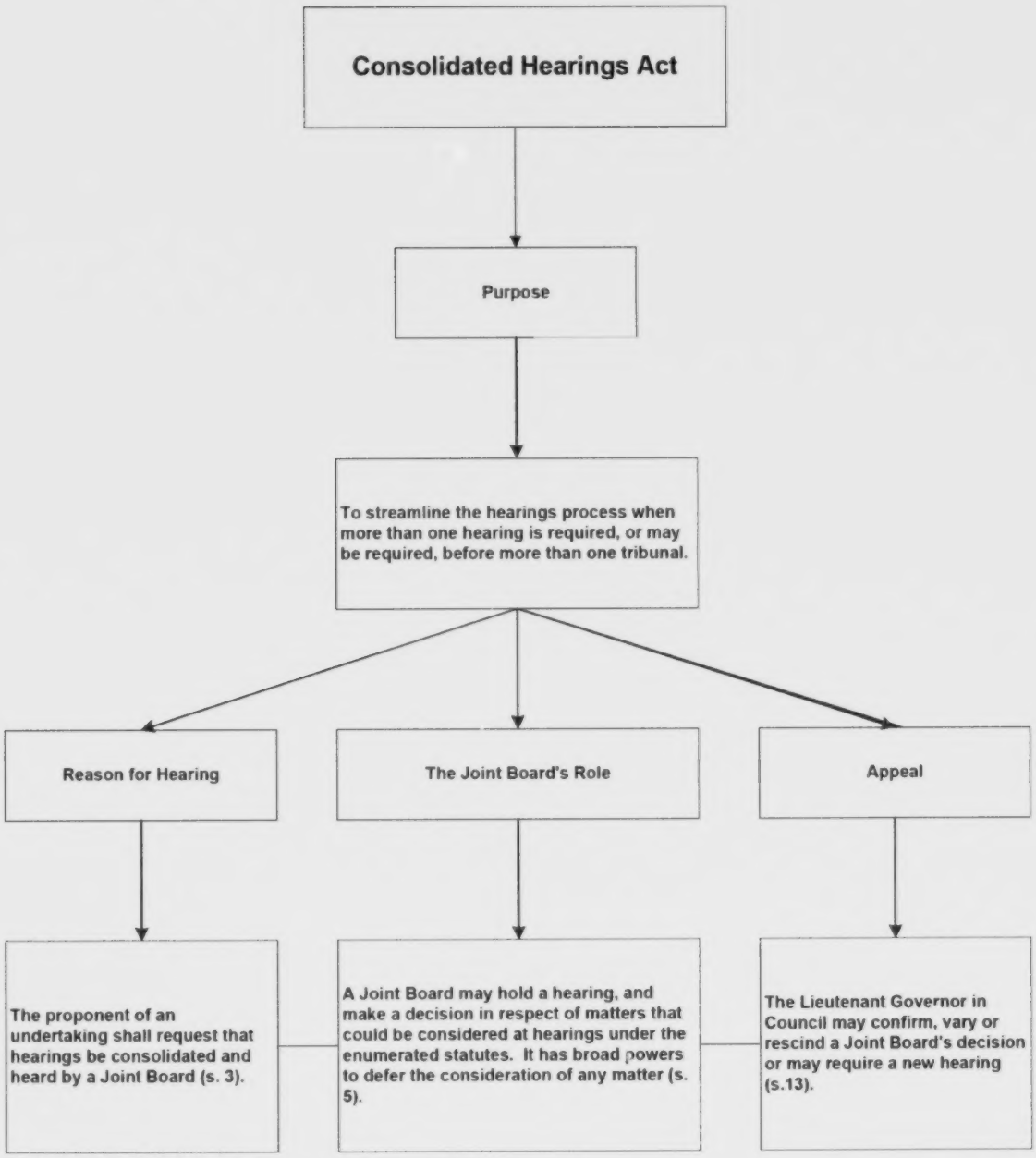
During the 2007-2008 fiscal year, the Tribunal produced "A Guide to Hearings under sections 12 or 18 of the *Greenbelt Act, 2005*."

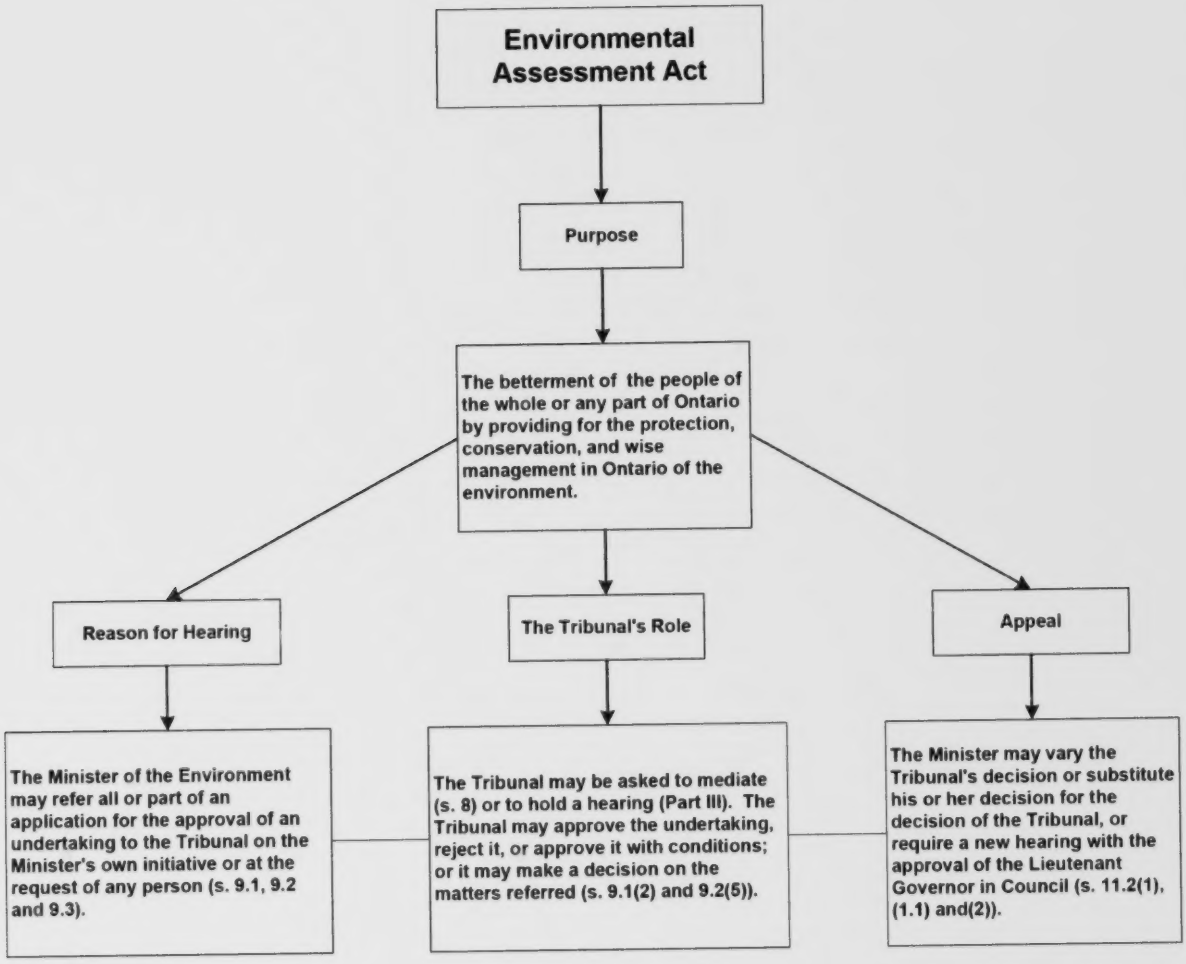
This Guide was created as a result of the appointment of the Tribunal as the Hearing Officer to hear matters under this *Act*. All of the Guides clarify the legislated requirements, the Tribunal's Rules and assist the public to better understand the hearing process.

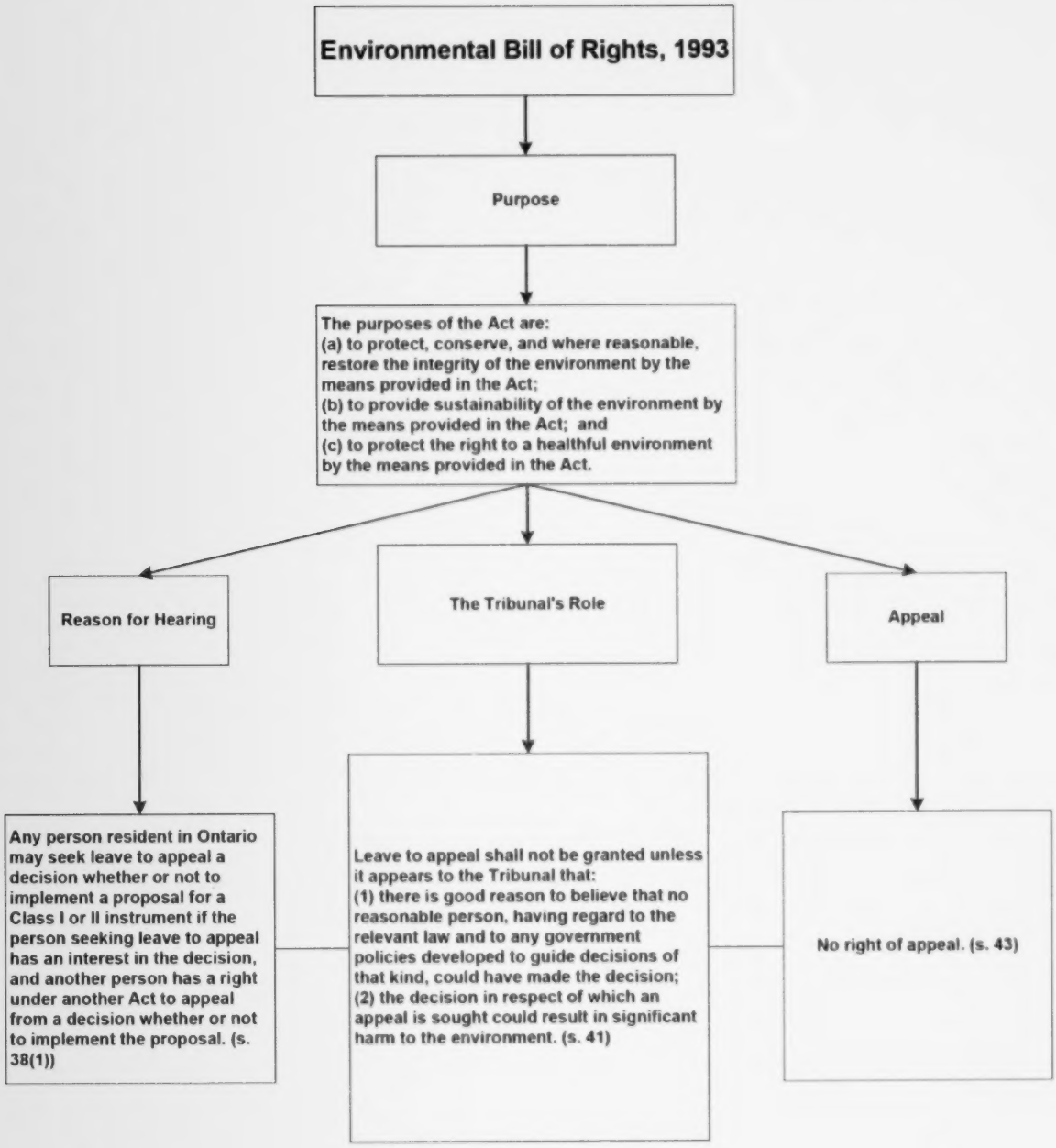
The Guides were also revised to reflect the changes made to the Tribunal's Rules of Practice and Practice Directions on November 15, 2007.

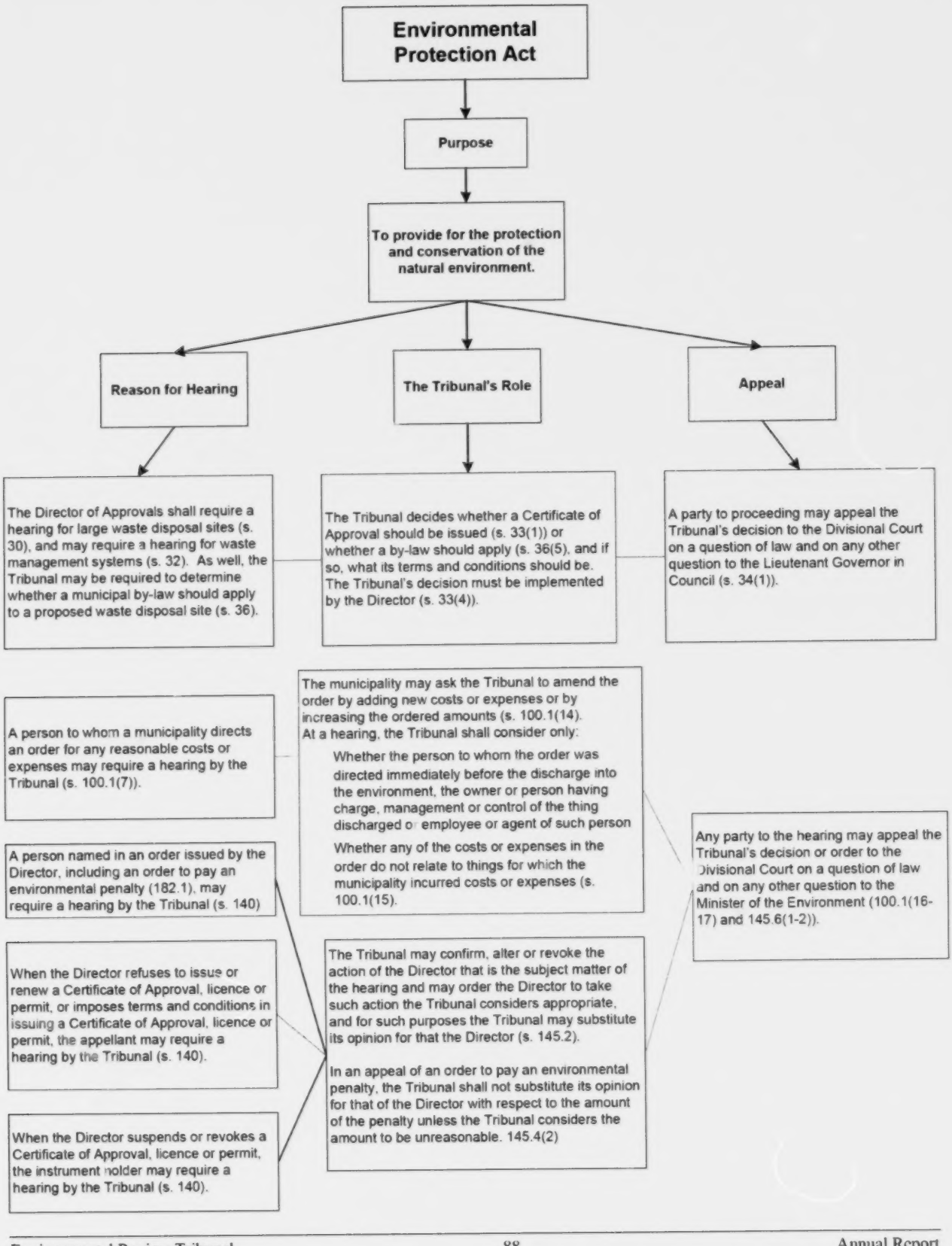
Appendix A

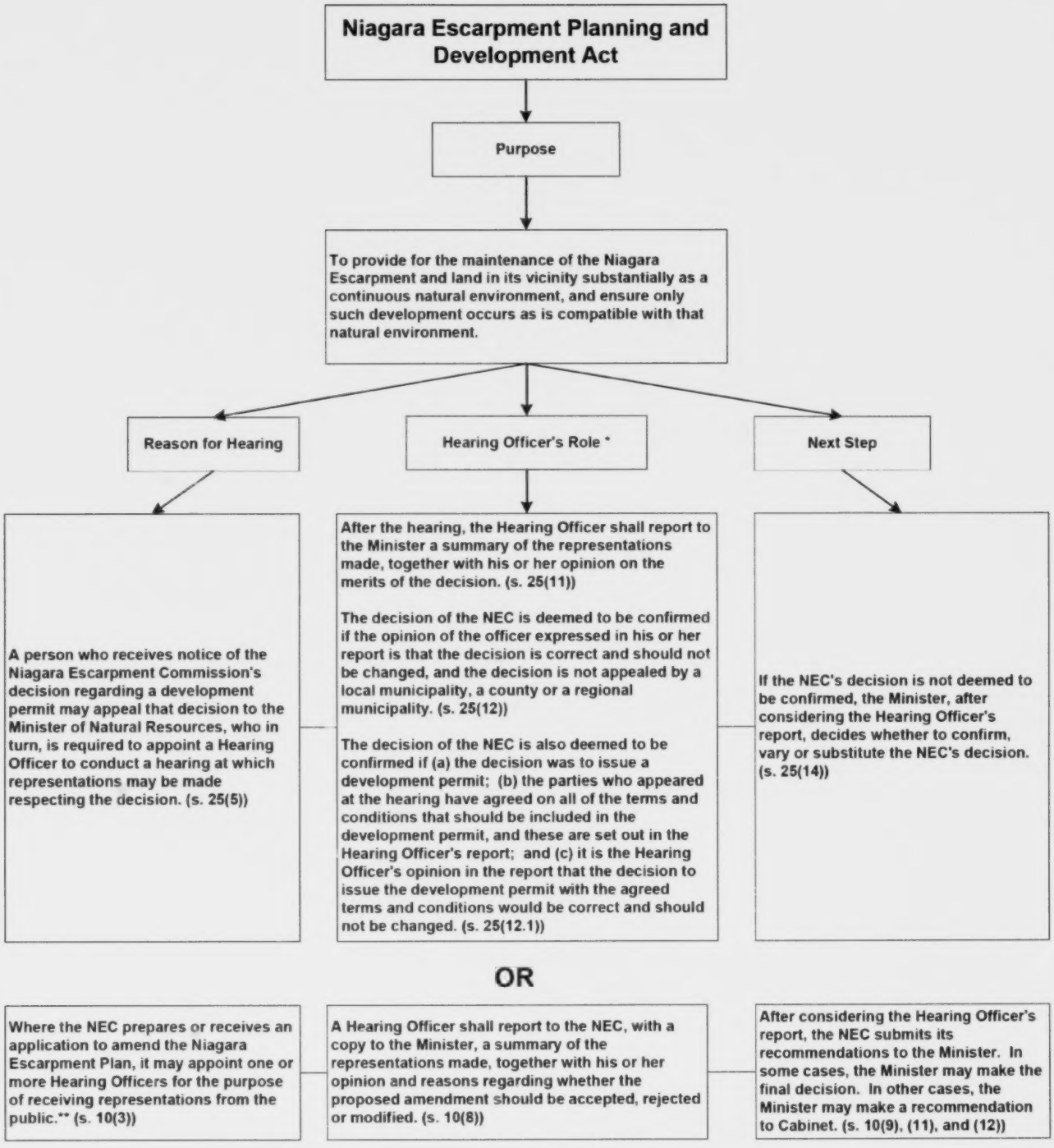
Overview of Relevant Legislation


Consolidated Hearings Act
Purpose
To streamline the hearings process when more than one hearing is required, or may be required, before more than one tribunal.
Reason for Hearing
The Joint Board's Role
Appeal
The proponent of an undertaking shall request that hearings be consolidated and heard by a Joint Board (s. 3).
A Joint Board may hold a hearing, and make a decision in respect of matters that could be considered at hearings under the enumerated statutes. It has broad powers to defer the consideration of any matter (s. 5).
The Lieutenant Governor in Council may confirm, vary or rescind a Joint Board's decision or may require a new hearing (s.13).


Environmental Assessment Act
Purpose
The betterment of the people of the whole or any part of Ontario by providing for the protection, conservation, and wise management in Ontario of the environment.
Reason for Hearing
The Tribunal's Role
Appeal
The Minister of the Environment may refer all or part of an application for the approval of an undertaking to the Tribunal on the Minister's own initiative or at the request of any person (s. 9.1, 9.2 and 9.3).
The Tribunal may be asked to mediate (s. 8) or to hold a hearing (Part III). The Tribunal may approve the undertaking, reject it, or approve it with conditions; or it may make a decision on the matters referred (s. 9.1(2) and 9.2(5)).
The Minister may vary the Tribunal's decision or substitute his or her decision for the decision of the Tribunal, or require a new hearing with the approval of the Lieutenant Governor in Council (s. 11.2(1), (1.1) and(2)).

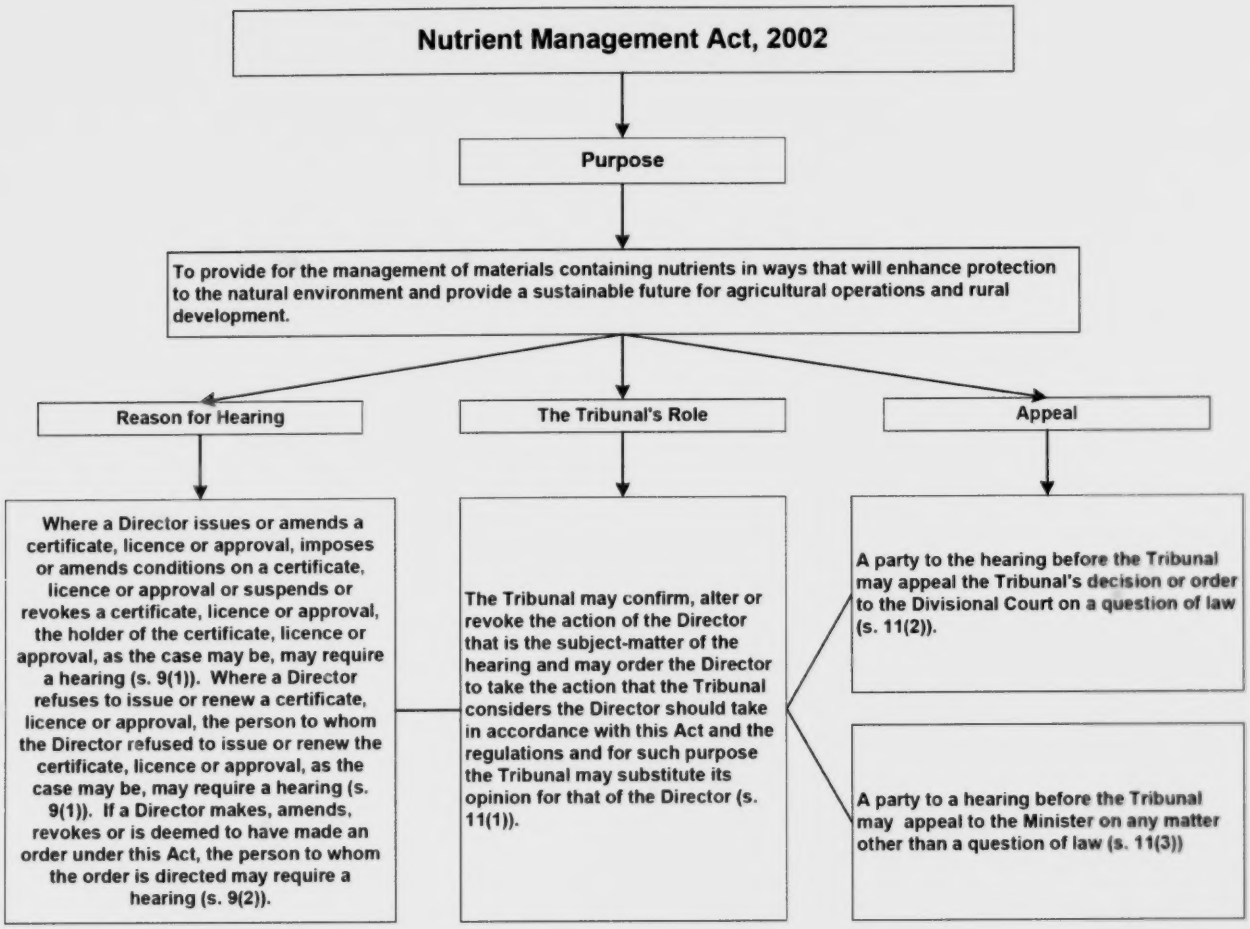

Environmental Bill of Rights, 1993
Purpose
The purposes of the Act are:
(a) to protect, conserve, and where reasonable, restore the integrity of the environment by the means provided in the Act;
(b) to provide sustainability of the environment by the means provided in the Act; and
(c) to protect the right to a healthful environment by the means provided in the Act.
Reason for Hearing
The Tribunal's Role
Appeal
Any person resident in Ontario may seek leave to appeal a decision whether or not to implement a proposal for a Class I or II instrument if the person seeking leave to appeal has an interest in the decision, and another person has a right under another Act to appeal from a decision whether or not to implement the proposal. (s. 38(1))
Leave to appeal shall not be granted unless it appears to the Tribunal that:
(1) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision;
(2) the decision in respect of which an appeal is sought could result in significant harm to the environment. (s. 41)
No right of appeal. (s. 43)


Environmental Protection Act
Purpose
To provide for the protection and conservation of the natural environment.
Reason for Hearing
The Tribunal's Role
Appeal
The Director of Approvals shall require a hearing for large waste disposal sites (s. 30), and may require a hearing for waste management systems (s. 32). As well, the Tribunal may be required to determine whether a municipal by-law should apply to a proposed waste disposal site (s. 36).
The Tribunal decides whether a Certificate of Approval should be issued (s. 33(1)) or whether a by-law should apply (s. 36(5), and if so, what its terms and conditions should be. The Tribunal's decision must be implemented by the Director (s. 33(4)).
A party to proceeding may appeal the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor in Council (s. 34(1)).
A person to whom a municipality directs an order for any reasonable costs or expenses may require a hearing by the Tribunal (s. 100.1(7)).
The municipality may ask the Tribunal to amend the order by adding new costs or expenses or by increasing the ordered amounts (s. 100.1(14).
At a hearing, the Tribunal shall consider only:
Whether the person to whom the order was directed immediately before the discharge into the environment, the owner or person having charge, management or control of the thing discharged or employee or agent of such person
Whether any of the costs or expenses in the order do not relate to things for which the municipality incurred costs or expenses (s. 100.1(15).
Any party to the hearing may appeal the Tribunal's decision or order to the Divisional Court on a question of law and on any other question to the Minister of the Environment (100.1(16-17) and 145.6(1-2)).
A person named in an order issued by the Director, including an order to pay an environmental penalty (182.1), may require a hearing by the Tribunal (s. 140)
When the Director refuses to issue or renew a Certificate of Approval, licence or permit, or imposes terms and conditions in issuing a Certificate of Approval, licence or permit, the appellant may require a hearing by the Tribunal (s. 140).
When the Director suspends or revokes a Certificate of Approval, licence or permit, the instrument holder may require a hearing by the Tribunal (s. 140).
The Tribunal may confirm, alter or revoke the action of the Director that is the subject matter of the hearing and may order the Director to take such action the Tribunal considers appropriate, and for such purposes the Tribunal may substitute its opinion for that the Director (s. 145.2).
In an appeal of an order to pay an environmental penalty, the Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable. 145.4(2)


Niagara Escarpment Planning and Development Act
Purpose
To provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and ensure only such development occurs as is compatible with that natural environment.
Reason for Hearing
Hearing Officer's Role *
Next Step
A person who receives notice of the Niagara Escarpment Commission's decision regarding a development permit may appeal that decision to the Minister of Natural Resources, who in turn, is required to appoint a Hearing Officer to conduct a hearing at which representations may be made respecting the decision. (s. 25(5))
After the hearing, the Hearing Officer shall report to the Minister a summary of the representations made, together with his or her opinion on the merits of the decision. (s. 25(11))
The decision of the NEC is deemed to be confirmed if the opinion of the officer expressed in his or her report is that the decision is correct and should not be changed, and the decision is not appealed by a local municipality, a county or a regional municipality. (s. 25(12))
The decision of the NEC is also deemed to be confirmed if (a) the decision was to issue a development permit; (b) the parties who appeared at the hearing have agreed on all of the terms and conditions that should be included in the development permit, and these are set out in the Hearing Officer's report; and (c) it is the Hearing Officer's opinion in the report that the decision to issue the development permit with the agreed terms and conditions would be correct and should not be changed. (s. 25(12.1))
If the NEC's decision is not deemed to be confirmed, the Minister, after considering the Hearing Officer's report, decides whether to confirm, vary or substitute the NEC's decision. (s. 25(14))
OR
Where the NEC prepares or receives an application to amend the Niagara Escarpment Plan, it may appoint one or more Hearing Officers for the purpose of receiving representations from the public.** (s. 10(3))
A Hearing Officer shall report to the NEC, with a copy to the Minister, a summary of the representations made, together with his or her opinion and reasons regarding whether the proposed amendment should be accepted, rejected or modified. (s. 10(8))
After considering the Hearing Officer's report, the NEC submits its recommendations to the Minister. In some cases, the Minister may make the final decision. In other cases, the Minister may make a recommendation to Cabinet. (s. 10(9), (11), and (12))

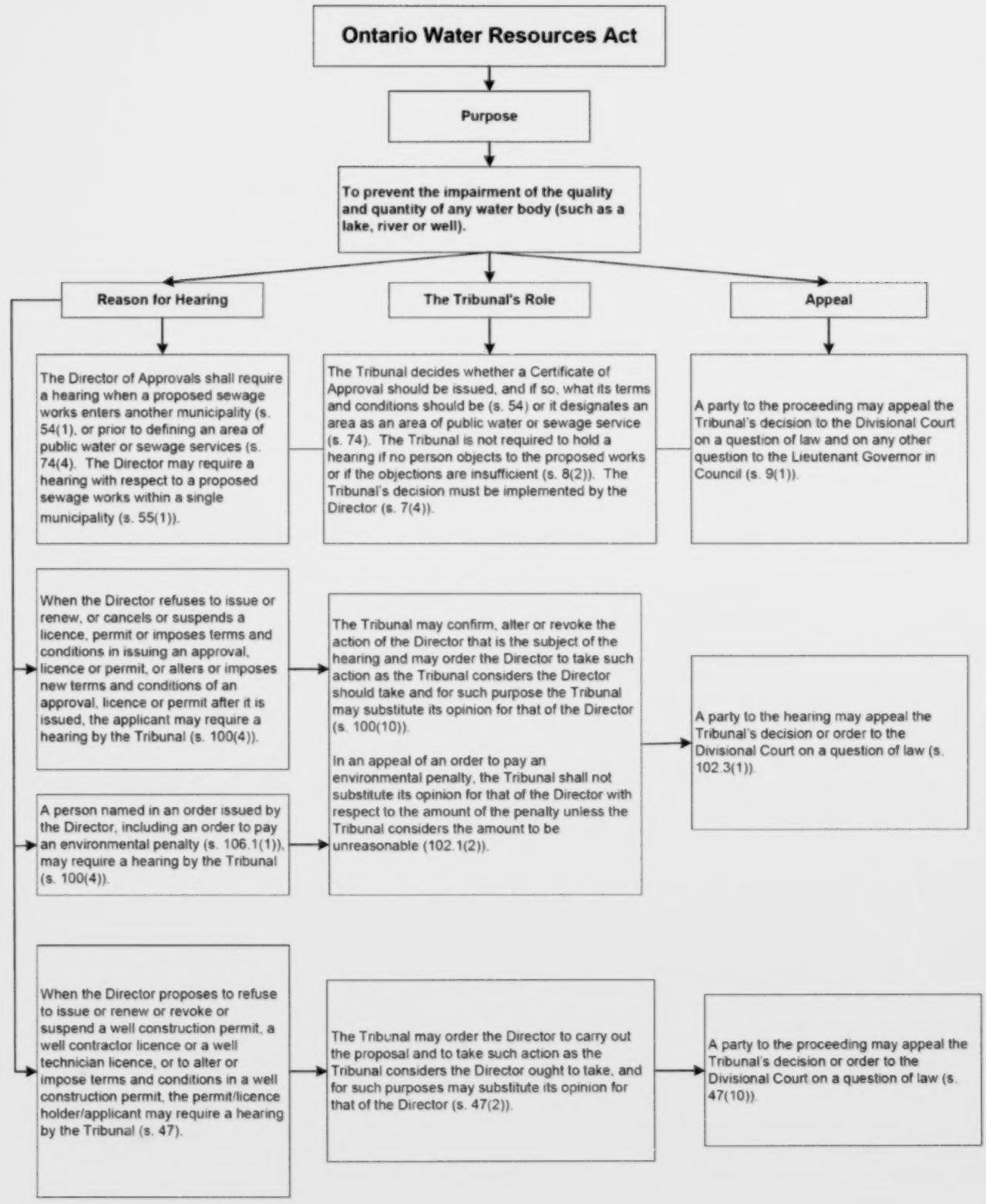
*Members of the Tribunal may be appointed as Hearing Officers under the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") to hear appeals of Niagara Escarpment Commission decisions on development permits and to conduct hearings on applications to amend the Niagara Escarpment Plan.

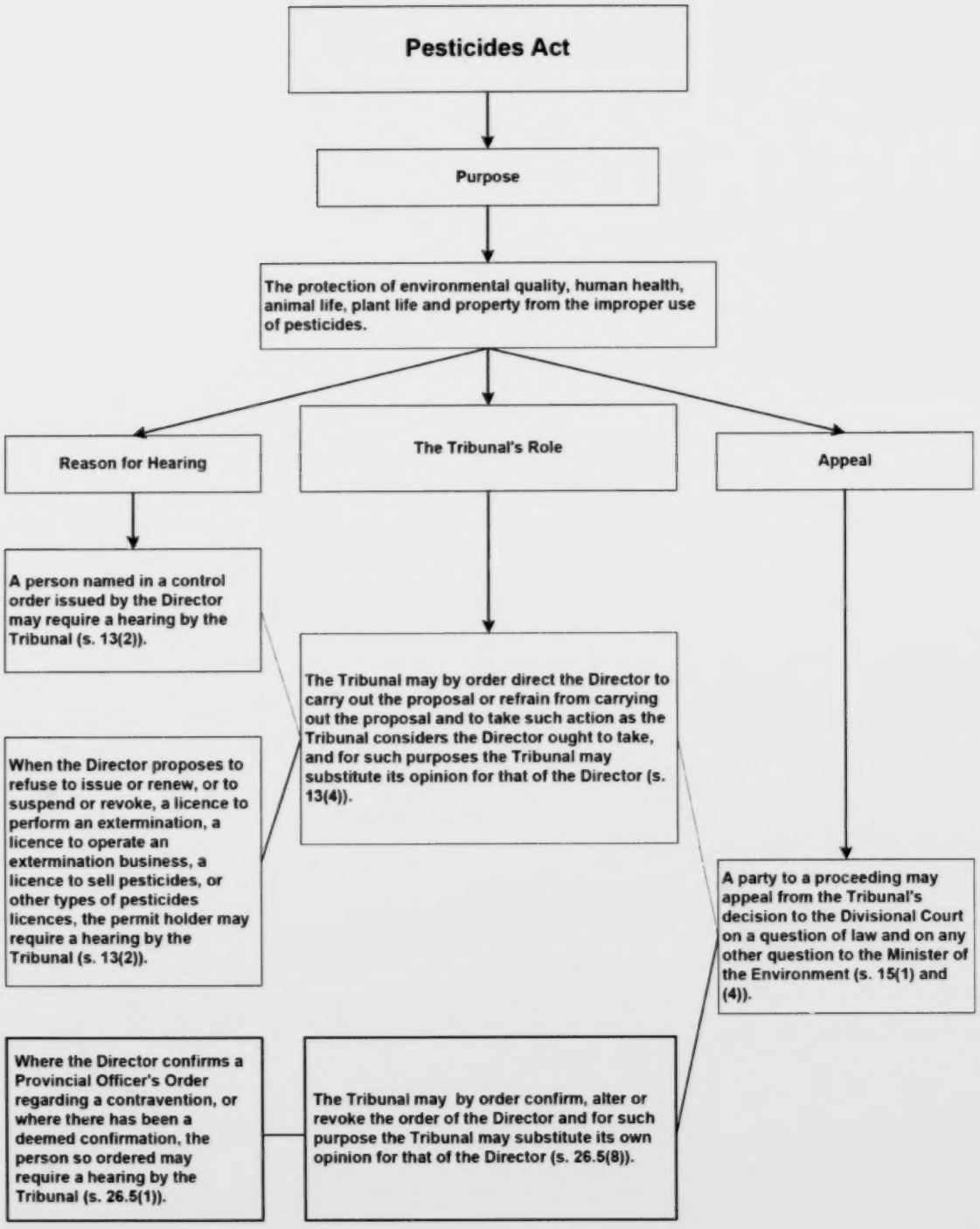
**Hearing Officers are normally appointed by the NEC to conduct hearings on proposed Plan amendments only if objections are made to the proposed amendments.

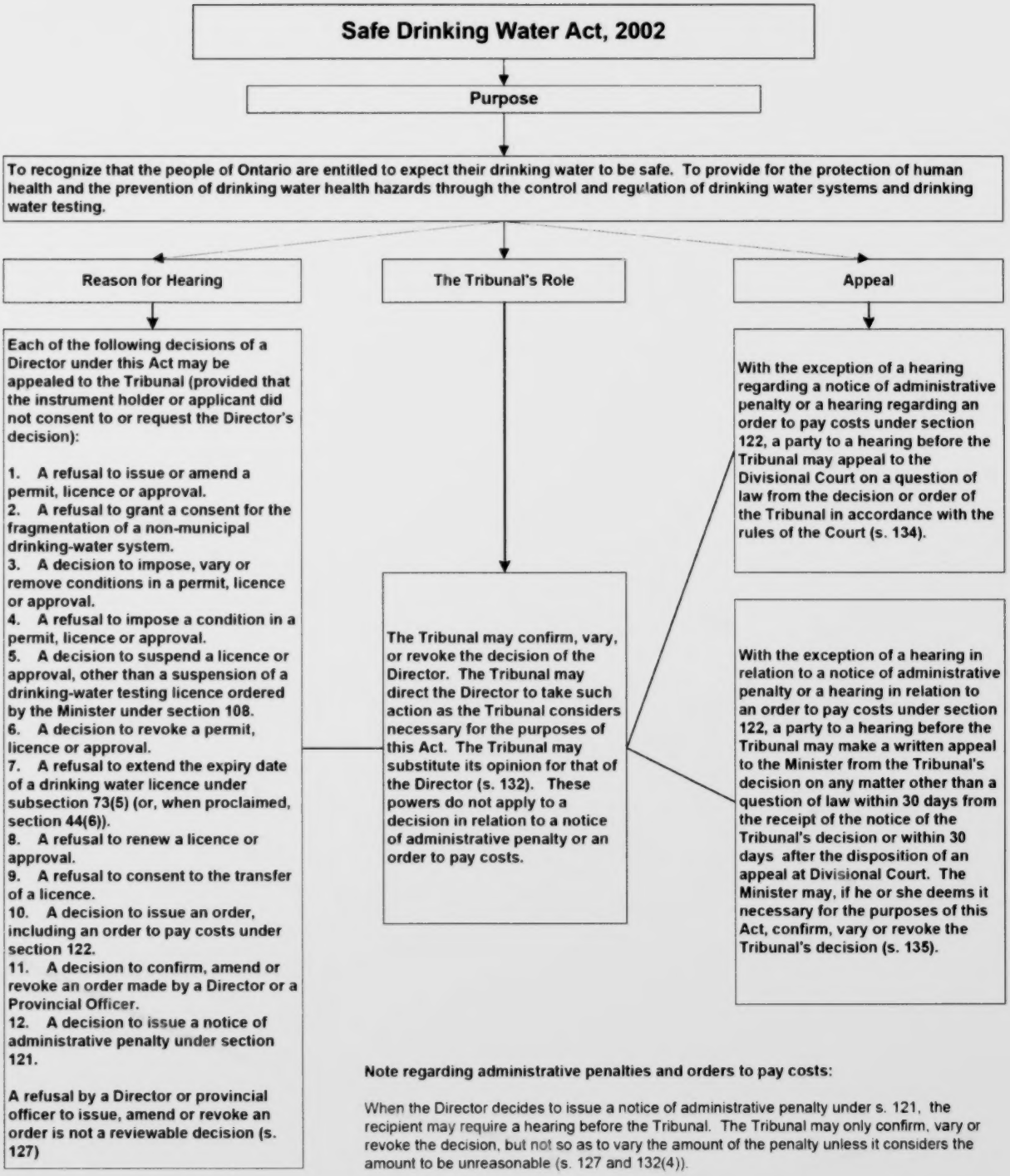

Nutrient Management Act, 2002
Purpose
To provide for the management of materials containing nutrients in ways that will enhance protection to the natural environment and provide a sustainable future for agricultural operations and rural development.
Reason for Hearing
The Tribunal's Role
Appeal
Where a Director issues or amends a certificate, licence or approval, imposes or amends conditions on a certificate, licence or approval or suspends or revokes a certificate, licence or approval, the holder of the certificate, licence or approval, as the case may be, may require a hearing (s. 9(1)). Where a Director refuses to issue or renew a certificate, licence or approval, the person to whom the Director refused to issue or renew the certificate, licence or approval, as the case may be, may require a hearing (s. 9(1)). If a Director makes, amends, revokes or is deemed to have made an order under this Act, the person to whom the order is directed may require a hearing (s. 9(2)).
The Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may order the Director to take the action that the Tribunal considers the Director should take in accordance with this Act and the regulations and for such purpose the Tribunal may substitute its opinion for that of the Director (s. 11(1)).
A party to the hearing before the Tribunal may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 11(2)).
A party to a hearing before the Tribunal may appeal to the Minister on any matter other than a question of law (s. 11(3))

Re: Administrative Penalties

When a Director is of the opinion that a person has contravened a provision of the Act or regulations, failed to comply with an Order under the Act (other than an Order to pay costs), or has failed to comply with a condition of a certificate, license or approval, the Director may issue a notice in writing requiring the person to pay an administrative penalty. The person to whom the order is directed, may require a hearing before the Tribunal (s. 40(1) and (5)).	The Tribunal may confirm, rescind or amend the notice according to what the Tribunal considers reasonable in the circumstances, but the Tribunal shall not vary the amount of the penalty unless it considers the amount to be unreasonable (s. 40(6)).	No appeal of decisions on administrative penalties.


Ontario Water Resources Act
Purpose
To prevent the impairment of the quality and quantity of any water body (such as a lake, river or well).
Reason for Hearing
The Tribunal's Role
Appeal
The Director of Approvals shall require a hearing when a proposed sewage works enters another municipality (s. 54(1), or prior to defining an area of public water or sewage services (s. 74(4). The Director may require a hearing with respect to a proposed sewage works within a single municipality (s. 55(1)).
The Tribunal decides whether a Certificate of Approval should be issued, and if so, what its terms and conditions should be (s. 54) or it designates an area as an area of public water or sewage service (s. 74). The Tribunal is not required to hold a hearing if no person objects to the proposed works or if the objections are insufficient (s. 8(2)). The Tribunal's decision must be implemented by the Director (s. 7(4)).
A party to the proceeding may appeal the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor in Council (s. 9(1)).
When the Director refuses to issue or renew, or cancels or suspends a licence, permit or imposes terms and conditions in issuing an approval, licence or permit, or alters or imposes new terms and conditions of an approval, licence or permit after it is issued, the applicant may require a hearing by the Tribunal (s. 100(4)).
The Tribunal may confirm, alter or revoke the action of the Director that is the subject of the hearing and may order the Director to take such action as the Tribunal considers the Director should take and for such purpose the Tribunal may substitute its opinion for that of the Director (s. 100(10)).
In an appeal of an order to pay an environmental penalty, the Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable (102.1(2)).
A party to the hearing may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 102.3(1)).
A person named in an order issued by the Director, including an order to pay an environmental penalty (s. 106.1(1)), may require a hearing by the Tribunal (s. 100(4)).
When the Director proposes to refuse to issue or renew or revoke or suspend a well construction permit, a well contractor licence or a well technician licence, or to alter or impose terms and conditions in a well construction permit, the permit/licence holder/applicant may require a hearing by the Tribunal (s. 47).
The Tribunal may order the Director to carry out the proposal and to take such action as the Tribunal considers the Director ought to take, and for such purposes may substitute its opinion for that of the Director (s. 47(2)).
A party to the proceeding may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 47(10)).

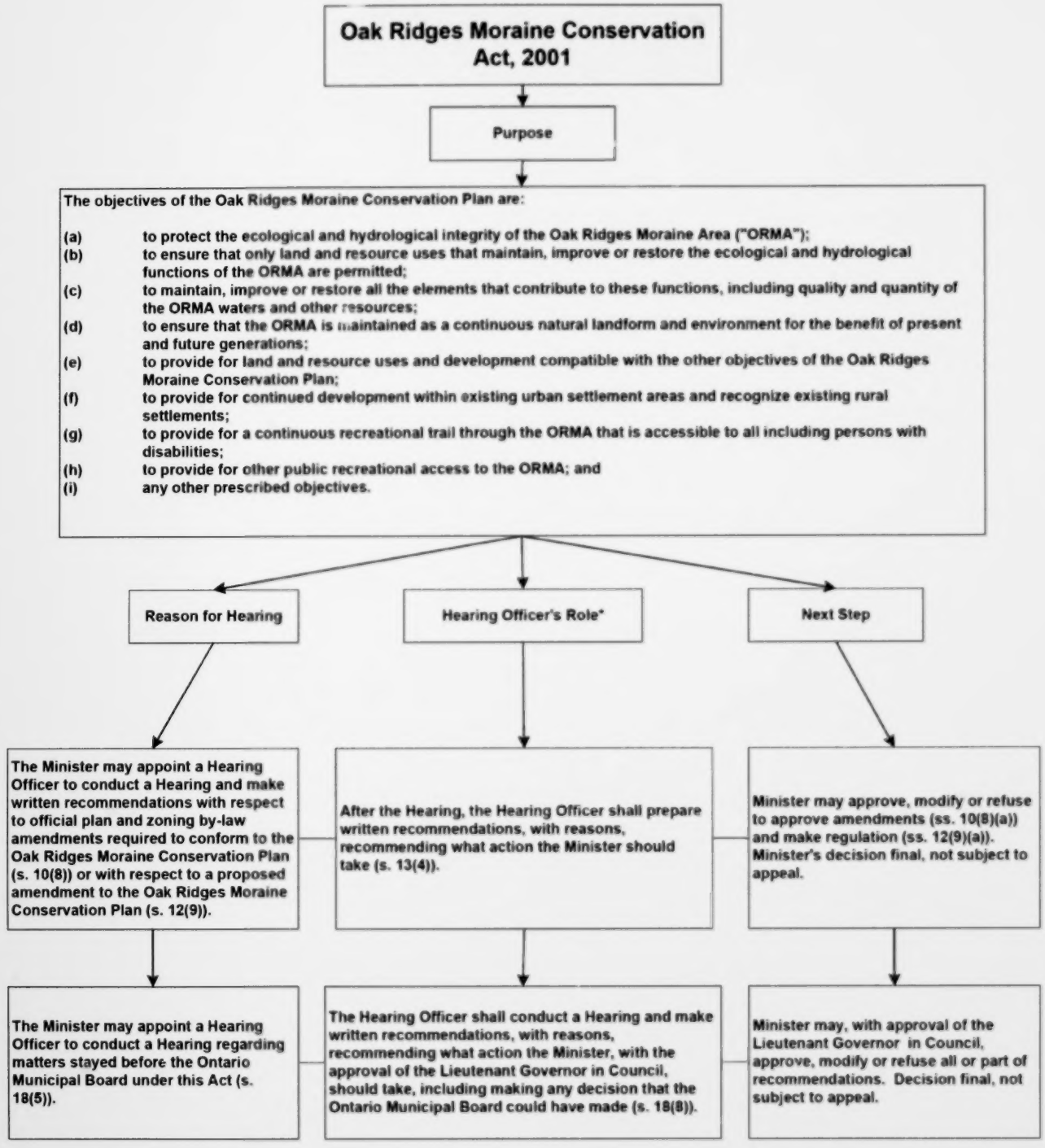

Pesticides Act
Purpose
The protection of environmental quality, human health, animal life, plant life and property from the improper use of pesticides.
Reason for Hearing
The Tribunal's Role
Appeal
A person named in a control order issued by the Director may require a hearing by the Tribunal (s. 13(2)).
When the Director proposes to refuse to issue or renew, or to suspend or revoke, a licence to perform an extermination, a licence to operate an extermination business, a licence to sell pesticides, or other types of pesticides licences, the permit holder may require a hearing by the Tribunal (s. 13(2)).
The Tribunal may by order direct the Director to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Director ought to take, and for such purposes the Tribunal may substitute its opinion for that of the Director (s. 13(4)).
A party to a proceeding may appeal from the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Minister of the Environment (s. 15(1) and (4)).
Where the Director confirms a Provincial Officer's Order regarding a contravention, or where there has been a deemed confirmation, the person so ordered may require a hearing by the Tribunal (s. 26.5(1)).
The Tribunal may by order confirm, alter or revoke the order of the Director and for such purpose the Tribunal may substitute its own opinion for that of the Director (s. 26.5(8)).


Safe Drinking Water Act, 2002
Purpose
To recognize that the people of Ontario are entitled to expect their drinking water to be safe. To provide for the protection of human health and the prevention of drinking water health hazards through the control and regulation of drinking water systems and drinking water testing.
Reason for Hearing
The Tribunal's Role
Appeal
Each of the following decisions of a Director under this Act may be appealed to the Tribunal (provided that the instrument holder or applicant did not consent to or request the Director's decision):
1. A refusal to issue or amend a permit, licence or approval.
2. A refusal to grant a consent for the fragmentation of a non-municipal drinking-water system.
3. A decision to impose, vary or remove conditions in a permit, licence or approval.
4. A refusal to impose a condition in a permit, licence or approval.
5. A decision to suspend a licence or approval, other than a suspension of a drinking-water testing licence ordered by the Minister under section 108.
6. A decision to revoke a permit, licence or approval.
7. A refusal to extend the expiry date of a drinking water licence under subsection 73(5) (or, when proclaimed, section 44(6)).
8. A refusal to renew a licence or approval.
9. A refusal to consent to the transfer of a licence.
10. A decision to issue an order, including an order to pay costs under section 122.
11. A decision to confirm, amend or revoke an order made by a Director or a Provincial Officer.
12. A decision to issue a notice of administrative penalty under section 121.
A refusal by a Director or provincial officer to issue, amend or revoke an order is not a reviewable decision (s. 127)
The Tribunal may confirm, vary, or revoke the decision of the Director. The Tribunal may direct the Director to take such action as the Tribunal considers necessary for the purposes of this Act. The Tribunal may substitute its opinion for that of the Director (s. 132). These powers do not apply to a decision in relation to a notice of administrative penalty or an order to pay costs.
With the exception of a hearing regarding a notice of administrative penalty or a hearing regarding an order to pay costs under section 122, a party to a hearing before the Tribunal may appeal to the Divisional Court on a question of law from the decision or order of the Tribunal in accordance with the rules of the Court (s. 134).
With the exception of a hearing in relation to a notice of administrative penalty or a hearing in relation to an order to pay costs under section 122, a party to a hearing before the Tribunal may make a written appeal to the Minister from the Tribunal's decision on any matter other than a question of law within 30 days from the receipt of the notice of the Tribunal's decision or within 30 days after the disposition of an appeal at Divisional Court. The Minister may, if he or she deems it necessary for the purposes of this Act, confirm, vary or revoke the Tribunal's decision (s. 135).

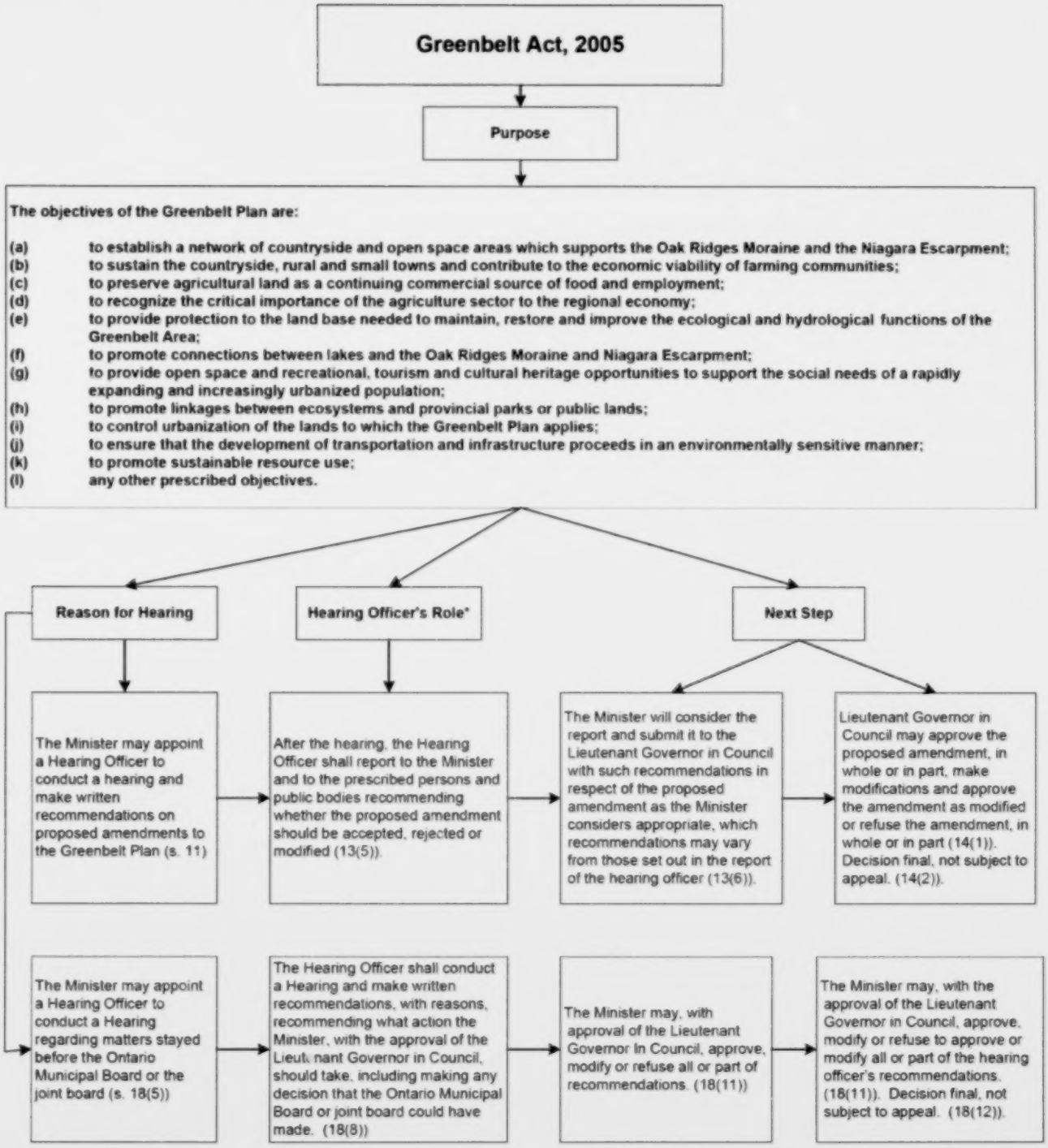
Note regarding administrative penalties and orders to pay costs:

When the Director decides to issue a notice of administrative penalty under s. 121, the recipient may require a hearing before the Tribunal. The Tribunal may only confirm, vary or revoke the decision, but not so as to vary the amount of the penalty unless it considers the amount to be unreasonable (s. 127 and 132(4)).

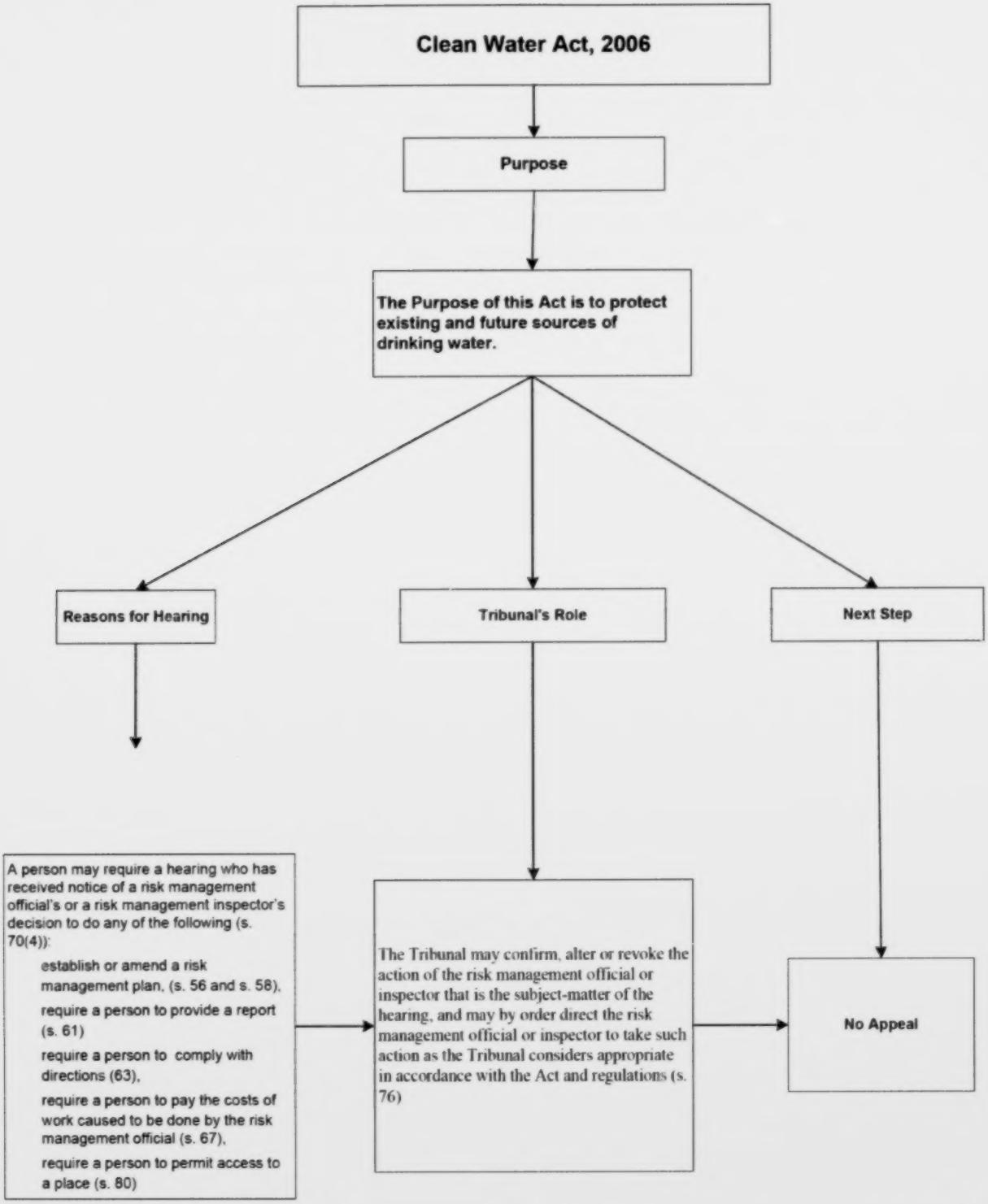
When the Director decides to issue an order to pay costs under section 122, the person to whom the order is issued may require a hearing before the Environmental Review Tribunal. The Tribunal may confirm, vary or revoke the decision. The Tribunal can also grant the Director's request to add new items of costs or to increase the amounts set out in the order (s. 127 and 133).


Oak Ridges Moraine Conservation Act, 2001
Purpose
The objectives of the Oak Ridges Moraine Conservation Plan are:
(a) to protect the ecological and hydrological integrity of the Oak Ridges Moraine Area ("ORMA");
(b) to ensure that only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the ORMA are permitted;
(c) to maintain, improve or restore all the elements that contribute to these functions, including quality and quantity of the ORMA waters and other resources;
(d) to ensure that the ORMA is maintained as a continuous natural landform and environment for the benefit of present and future generations;
(e) to provide for land and resource uses and development compatible with the other objectives of the Oak Ridges Moraine Conservation Plan;
(f) to provide for continued development within existing urban settlement areas and recognize existing rural settlements;
(g) to provide for a continuous recreational trail through the ORMA that is accessible to all including persons with disabilities;
(h) to provide for other public recreational access to the ORMA; and
(i) any other prescribed objectives.
Reason for Hearing
Hearing Officer's Role*
Next Step
The Minister may appoint a Hearing Officer to conduct a Hearing and make written recommendations with respect to official plan and zoning by-law amendments required to conform to the Oak Ridges Moraine Conservation Plan (s. 10(8)) or with respect to a proposed amendment to the Oak Ridges Moraine Conservation Plan (s. 12(9)).
After the Hearing, the Hearing Officer shall prepare written recommendations, with reasons, recommending what action the Minister should take (s. 13(4)).
Minister may approve, modify or refuse to approve amendments (ss. 10(8)(a)) and make regulation (ss. 12(9)(a)). Minister's decision final, not subject to appeal.
The Minister may appoint a Hearing Officer to conduct a Hearing regarding matters stayed before the Ontario Municipal Board under this Act (s. 18(5)).
The Hearing Officer shall conduct a Hearing and make written recommendations, with reasons, recommending what action the Minister, with the approval of the Lieutenant Governor in Council, should take, including making any decision that the Ontario Municipal Board could have made (s. 18(8)).
Minister may, with approval of the Lieutenant Governor in Council, approve, modify or refuse all or part of recommendations. Decision final, not subject to appeal.

*The Tribunal has been appointed the Hearing Officer under the *Oak Ridges Moraine Conservation Act, 2001*.


Greenbelt Act, 2005
Purpose
The objectives of the Greenbelt Plan are:
(a) to establish a network of countryside and open space areas which supports the Oak Ridges Moraine and the Niagara Escarpment;
(b) to sustain the countryside, rural and small towns and contribute to the economic viability of farming communities;
(c) to preserve agricultural land as a continuing commercial source of food and employment;
(d) to recognize the critical importance of the agriculture sector to the regional economy;
(e) to provide protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt Area;
(f) to promote connections between lakes and the Oak Ridges Moraine and Niagara Escarpment;
(g) to provide open space and recreational, tourism and cultural heritage opportunities to support the social needs of a rapidly expanding and increasingly urbanized population;
(h) to promote linkages between ecosystems and provincial parks or public lands;
(i) to control urbanization of the lands to which the Greenbelt Plan applies;
(j) to ensure that the development of transportation and infrastructure proceeds in an environmentally sensitive manner;
(k) to promote sustainable resource use;
(l) any other prescribed objectives.
Reason for Hearing
Hearing Officer's Role*
Next Step
The Minister may appoint a Hearing Officer to conduct a hearing and make written recommendations on proposed amendments to the Greenbelt Plan (s. 11)
After the hearing, the Hearing Officer shall report to the Minister and to the prescribed persons and public bodies recommending whether the proposed amendment should be accepted, rejected or modified (13(5)).
The Minister will consider the report and submit it to the Lieutenant Governor in Council with such recommendations in respect of the proposed amendment as the Minister considers appropriate, which recommendations may vary from those set out in the report of the hearing officer (13(6)).
Lieutenant Governor in Council may approve the proposed amendment, in whole or in part, make modifications and approve the amendment as modified or refuse the amendment, in whole or in part (14(1)). Decision final, not subject to appeal. (14(2)).
The Minister may appoint a Hearing Officer to conduct a Hearing regarding matters stayed before the Ontario Municipal Board or the joint board (s. 18(5))
The Hearing Officer shall conduct a Hearing and make written recommendations, with reasons, recommending what action the Minister, with the approval of the Lieutenant Governor in Council, should take, including making any decision that the Ontario Municipal Board or joint board could have made. (18(8))
The Minister may, with approval of the Lieutenant Governor in Council, approve, modify or refuse all or part of recommendations. (18(11))
The Minister may, with the approval of the Lieutenant Governor in Council, approve, modify or refuse to approve or modify all or part of the hearing officer's recommendations. (18(11)). Decision final, not subject to appeal. (18(12)).

The Tribunal has been appointed the Hearing Officer under the *Greenbelt Act, 2005*


Clean Water Act, 2006
Purpose
The Purpose of this Act is to protect existing and future sources of drinking water.
Reasons for Hearing
Tribunal's Role
Next Step
A person may require a hearing who has received notice of a risk management official's or a risk management inspector's decision to do any of the following (s. 70(4)):
establish or amend a risk management plan, (s. 56 and s. 58),
require a person to provide a report (s. 61)
require a person to comply with directions (63),
require a person to pay the costs of work caused to be done by the risk management official (s. 67),
require a person to permit access to a place (s. 80)
The Tribunal may confirm, alter or revoke the action of the risk management official or inspector that is the subject-matter of the hearing, and may by order direct the risk management official or inspector to take such action as the Tribunal considers appropriate in accordance with the Act and regulations (s. 76)
No Appeal

Appendix B

Profile of Tribunal Members

Chair

Toby Vigod *(appointment expires May 31, 2009)*

- Appointed as Chair in June 2005
- Appointed as a Vice-Chair in December 2004
- Manager, Federal/Provincial/Territorial Relations and Co-Manager, National Secretariat, Climate Change Secretariat, Ottawa (2000-2004)
- Chair, Environmental Appeal Board and Forest Appeals Commission, British Columbia (1996-2000)
- Assistant Deputy Minister, Department of Policy, Planning and Legislation, Ministry of Environment, Lands and Parks, British Columbia (1994-1996)
- Commissioner, Commission on Planning and Development Reform in Ontario (1991-1993)
- Sessional Lecturer, Queen's University, Faculty of Law (1985-1991, 1993); University of Toronto, Faculty of Law (1991 and 1992); Osgoode Hall Law School (1993); Queen's School of Public Administration (1990 and 1991); Department of Geography, Ryerson University (2005)
- Counsel (1980-1993) and Executive Director (1986-1993), Canadian Environmental Law Association
- Called to the Ontario Bar (1980)
- B.A. (History Specialist) University of Toronto (1973) and LL.B Queen's University (1977)
- Member of a number of federal and Ontario environmental law reform committees; written extensively in the areas of environmental law and policy

Vice-Chairs

Jerry V. DeMarco *(appointment expires June 26, 2009)*

- Appointed as a Vice-Chair in June 2005
- Staff Lawyer (1996-2000) and Managing Lawyer (2000-2004), Sierra Legal Defence Fund, Ontario Office
- Master of Management (M.M.), McGill (2003); Master in Environmental Studies (M.E.S.), York (1994); Bachelor of Laws (LL.B.), Toronto (1994); Bachelor of Arts (B.A.), Winsdor (1990)
- Registered Professional Planner (R.P.P./MCIP) (1996)
- Called to the Ontario Bar (1996)
- Articled at Ministry of Environment and Energy (1994-1995)
- Publications have appeared in a wide variety of periodicals, journals and books
- Recipient of City of Toronto's first Green Toronto Award for environmental leadership

Knox M. Henry *(appointment expires March 14, 2009)*

- Acting Chair (December 2004-May 2005)
- Appointed as a Vice-Chair in 1991
- Member, Environmental Appeal Board (1978-1991)
- Member, Pesticides Appeal Board (1975-1978)
- Cross-appointed as member of the Ontario Rental Housing Tribunal (1999-2003)
- Cross-appointed as a Deputy Mining and Lands Commissioner (1995-1997)
- Strong background as one of Canada's leading horticulturalists
- Guest lecturer on propagation, management and environmental issues at various universities and colleges

Paul Muldoon *(appointment expires April 3, 2009)*

- Appointed as a Vice-Chair in April 2006
- Staff Lawyer (1994-1998) and Executive Director (1998-2006), Canadian Environmental Law Association
- Masters of Laws (LL.M), McGill (1984); Masters of Arts (M.A.), McMaster (1983), Bachelor of Laws (LL.B.) Ottawa, 1981, Bachelor of Arts (B.A.) Wilfrid Laurier, 1978
- Called to the Ontario Bar (1984)
- Member, Science Advisory Board, International Joint Commission (1990-1995)
- Member, Environmental Bill of Rights Task Force (1992-1994)
- Author or Co-author of a number of books and dozens of published articles
- Lecturer on environmental law at the Centre for the Environment, University of Toronto and the Faculty of Environmental Studies, York University

Dirk VanderBent *(appointment expires September 17, 2008)*

- Appointed as a Vice-Chair in September 2006
- Senior Manager, Judicial Support, Office of the Chief Justice, Ontario Court of Justice (2000 to 2006)
- Representative for the Attorney General, during the Walkerton water contamination crisis (2000)
- Mediator/Arbitrator, Financial Services Commission of Ontario (1994 to 2000)
- Senior Counsel, Children's Aid Society of Hamilton-Wentworth (1991 to 1994)
- Barrister & Solicitor in private practice, (1982 to 1991)
- Called to the Ontario Bar 1982
- Certificate in Advanced Mediation Skills, Ryerson Polytechnical Institute (1990)
- B. Math University of Waterloo (1975), LL.B. Osgoode Hall Law School (1980)

Robert V. Wright *(appointment expires August 26, 2009)*

- Appointed as a Vice-Chair in August 2007
- Senior Counsel (2000-2007) and Managing Lawyer (2005-2007), Sierra Legal Defence Fund, Toronto (now Ecojustice Canada)
- Sole Practitioner, civil litigation and commercial law, Toronto (1998-2000)

- Fellow of LEAD Canada, International sustainable development program under the auspices of the National Roundtable on the Environment and the Economy and the International Development Research Centre, Ottawa, Thailand and Zimbabwe (1994-1996)
- Litigation Counsel and Partner, Owens, Wright; Toronto (1984-1998)
- Solicitor, Durrant, Piesse; London, England (1984)
- Solicitor's Final Examination, The Law Society of England and Wales, London, England (1984)
- Master of Laws (LL.M.), University of Cambridge, Sidney Sussex College, Cambridge, England (1984)
- Commercial litigation Associate, Borden & Elliot (now Borden, Ladner, Gervais), Toronto (1981-1983)
- Litigation Associate, McMaster, Montgomery, Toronto (1980-1981)
- Called to the Ontario Bar (1980)
- Articling student, Giffen, Pensa (now Pensa & Associates), London, Ontario (1978-1979)
- Bachelor of Laws (LL.B.), University of Western Ontario (1978)
- Bachelor of Arts (B.A.), University of Toronto (1975)

Part-time Members

Heather Gibbs *(appointment expires June 29, 2009)*

- Appointed as a Member July 1, 2007
- Appointed as a Vice-Chair September 20, 2006
- Appointed as a Member of the Immigration and Refugee Board from November 1998 to September 2006, where she was member of the Professional Development Committee and nominated to conduct training for decision-makers in Mexico
- Legal Officer with the United Nations High Commissioner for Refugees (1994 to 1998), as a local Officer in Canada as well as a Regional Legal Officer in Rwanda and Central African Republic
- Called to the Ontario Bar (1992) and subsequently practiced administrative law (human rights, labour and immigration law)
- Graduate of University of Ottawa (L.L.B. 1990) and University of Western Ontario (B.A. 1986)

Alan D. Levy *(appointment expires May 8, 2009)*

- Appointed as a Member May 9, 2007
- Mediator & lawyer in private practice (commencing 1972)
- Roster mediator, Ontario Mandatory Mediation Program, Superior Court of Justice (since 1999)
- Director of Environmental Law Practicum, adjunct member of Faculty of Law, University of Toronto (since 2000)
- Executive member, Advisory Panel of Minister of Environment (Ontario) on improving environmental assessment process (2004-2005)
- Vice-Chair (part-time), Workplace Safety and Insurance Appeals Tribunal (2004-2007)

- Mediator, Canadian Environmental Assessment Agency, Ontario Region (2002-2003)
- Vice-Chair, Environmental Assessment Board, Ontario (1990-1998)
- Member, Environmental Appeal Board, Ontario (1991-1998)
- A founder, Canadian Environmental Law Association (1970)

Franco R. Mariotti *(appointment expired August 26, 2007)*

- Appointed as a Member in 1987 and a resident of Whitefish, Ontario
- He has traveled widely in North and South America, Iceland, and the Galapagos
- A founder of the Sudbury Naturalists' Club; active in social and environmentally-concerned groups
- A Biologist/Staff Scientist at Science North and manager of its Biosphere Exhibit since 1981

George W. Ozburn *(appointment expired August 26, 2007)*

- Appointed as a Member in 1975 and a resident of Thunder Bay, Ontario
- Bachelor of Science degree in Agriculture (McGill); spent a year studying at Imperial College of Science and Technology in London (UK) prior to receiving his Ph.D. (Entomology and Toxicology) from McGill University, and prior to joining the Faculty of Science at Lakehead University in Thunder Bay
- Worked in pesticide research for three years in West Africa followed by a university appointment in Michigan
- For many years was responsible for a major study of chronic and acute toxicity of many families of chlorinated organic compounds
- As Professor Emeritus, is now associated with a laboratory at Lakehead University which carries out regulatory and chronic toxicity testing for industry

Bruce Pardy *(appointment expires June 21, 2009)*

- Appointed as a Member in June 2005
- Associate Professor, Faculty of Law, Queen's University (2000 -)
- Associate Dean, Faculty of Law, Queen's University (2002-04)
- Visiting Professor, South Texas School of Law International Program, Malta (2000); California Western School of Law, San Diego (1998-2000); Seattle University School of Law (1996)
- Visiting Scholar, University of British Columbia Faculty of Law (1997)
- Senior Lecturer (Associate Professor) (1996-99) and Lecturer (Assistant Professor) (1993-96), Faculty of Law, Victoria University of Wellington, New Zealand
- Sessional Lecturer, Faculty of Law, University of Western Ontario (1992)
- Lawyer, Litigation Associate (1990-93) and Articling Student (1988-89), Borden Ladner Gervais LLP, Barristers & Solicitors
- Called to the Ontario Bar (1990)
- LL.B. University of Western Ontario (1988); LL.M. Dalhousie University (1991)
- Written extensively on environmental law and policy in Canada, U.S. and New Zealand

Mary C. Schwass *(appointment expired August 26, 2007)*

- Appointed as a Member in 1987 and a resident of Tara, Ontario
- President of Canadian International Consulting Economists Ltd., a firm specializing in developing long-term strategic planning, policies and priorities for private sector companies and governments throughout North America, Africa and Asia

Dayna Nadine Scott *(appointment expires May 8, 2009)*

- Appointed as a Member May 9, 2007
- Assistant Professor, Osgoode Hall Law School and the Faculty of Environmental Studies, York University (2006-)
- Legal Research Fellow, McGill Center for International Sustainable Development Law, Montreal; Sessional Lecturer, McGill Faculty of Law (2005-2006)
- Fulbright Scholar, NYU School of Law (2004-2005)
- Called to the Ontario Bar (2002)
- Law Clerk, Federal Court of Canada (2001-2002)
- B.Sc. (Hons.) (Guelph); LL.B. (Osgoode); MES (York); Ph.D. (Osgoode)
- Publishes in the area of environmental law and regulation

Marcia Valiante *(appointment expires May 8, 2009)*

- Appointed as a Member May 9, 2007
- Professor of Law, University of Windsor (since 1992)
- Teaches Canadian Environmental Law, International Environmental Law, Planning Law, Property Law
- B.A., B.Sc. University of New Hampshire, LL.B. Osgoode Hall Law School, LL.M. Queen's University
- Called to the Bar of Ontario, 1986
- Member, International Joint Commission Great Lakes Science Advisory Board
- Author of works on Canadian environmental law and policy, planning law, water law and Great Lakes governance

Joyce M. Young *(appointment expires April 10, 2009)*

- Appointed as a member in April 2006
- Mediator for over 20 years
- Trained Circle facilitator
- Teaches in the Advanced Dispute Resolution Certificate Program at York University
- Director of the Alternative Dispute Resolution Institute of Ontario
- Mediated a number of Environmental Assessments for both private and public proponents
- Negotiated one of the first Community Compensation Agreements between a private waste management company and a Public Liaison Committee of local residents and stakeholders

Appendix C

Learning Programs		
Date	**Topic**	**Presenters/Visitors**
June 1, 2007	Changes to the *Planning Act* resulting from Bill 51	Ken Hare, Counsel, Ministry of Municipal Affairs and Housing, Planning Law Section
	The *Municipal Statue Law Amendment Act, 2006* (Bill 130)	Elaine Ross, Senior Counsel, Ministry of Municipal Affairs and Housing, Municipal Law Section
June 15, 2007	Walkerton Clean Water Centre	Dr. Souleymane Ndiongue, P.Eng.
	Tour of WCWC Technology Demonstration Centre	
	Melancthon Wind Project	Mr. Morris Hickey, Site Manager
September 14, 2007	Environmental Penalties	Cynthia Carr, Land and Water Policy Branch, MOE Kelly Pritchard, Operations Division (West Central Region), MOE Kristopher Crawford-Dickson, Legal Services Branch, MOE
	Service Regulations	George Leonard, Legal Services Branch, MOE Kelly Pritchard, Operations Division (West Central Region), MOE
	Safeguarding and Sustaining Ontario Water Act, 2007	Caroline Cosco, Land and Water Policy Branch, MOE Risa Schwartz, Legal Services Branch, MOE Dan Dobrin, South West Region, MOE
	SSOWA-Charges for Industrial and Commercial Water Users (Phase 1)	Chris Lompart, Land and Water Policy Branch, MOE
December 7, 2007	Environmental Assessment Improvements: Update	Ariane Heisey, Special Project Adviser, EA Project Coordination Section, Environmental Assessment and Approvals Branch, MOE

February 22, 2008	*Greenbelt Act, 2005* and the Role of the ERT	Carolyn Tudge, Team Lead, Provincial Planning Policy Branch, MAH Angelune Des Lauriers, Senior Planner, Provincial Planning Policy Branch, MAH Peter Matheson-Young, Counsel, Planning Law Section, MAH

Appendix D

Key Performance Goals and Objectives For Next Fiscal Year 2008-2009

For more information on the Tribunal's performance goals and objectives refer to the Business Plan for 2008-2011.

1. Core Function: Pre-Hearings, Hearings Decision Making			
Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #1: Tribunal Members will treat all participants in a hearing with courtesy and respect.	The Tribunal will distribute and review the completed Questionnaires that are received from participants of a hearing to monitor respect and courtesy. The Tribunal will investigate complaints in accordance with the Tribunal's Complaints Policy.	To continue to provide Questionnaires to hearing participants; To continue to monitor the conduct of Tribunal Members; To investigate complaints in accordance with the Tribunal's Complaints Policy.	Results of completed hearing Questionnaires received will be reported in the Tribunal's Annual Report. All complaints will be treated seriously and the Tribunal will comply with its Complaints Policy.
Commitment #2: Tribunal Members will render timely decisions.	The Tribunal will track the time it takes a Member to render his/her written decisions.	Tribunal Members will render decisions within 60 days of final arguments or submissions, except those decisions that have legislated timelines and decisions under the *Consolidated Hearings Act*.	Tribunal Members will adhere to the target to render decisions within 60 days of the conclusion of the hearing in 80% of all decisions rendered.

Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #3: Training of Tribunal Members.	All Tribunal Members will receive adequate training to conduct hearings, write decisions and, in some cases, conduct mediation sessions.	Tribunal Members will be trained in the processes and conduct of hearings, knowledge of legislation, Tribunal's Rules, decision writing and alternative dispute resolution.	New Tribunal Members without prior Tribunal experience are trained to conduct hearings independently within three months of their appointment. All Tribunal Members will receive ongoing training regarding the Tribunal's legislation, Rules of Practice and administrative policies and procedures. The Tribunal will continue to conduct its Learning Programs designed to enlighten its Members on environmental, planning and administrative law issues.

Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #4: Offer pre-hearing conferences in appeals under the *NEPDA** and schedule preliminary hearings in all other appeals and applications, prior to the commencement of the hearing. **Niagara Escarpment Planning and Development Act*	When all parties agree to participate, pre-hearing conferences for matters under the *NEPDA** will be held and for all other appeals and applications, preliminary hearings will be held, at least 30 days prior to the commencement of the hearing.	The Tribunal will encourage parties to participate in pre-hearing conferences under the *NEPDA* * and continue to hold preliminary hearings for all other appeals and applications.	Continue to offer pre-hearing conferences in appeals matter under the *NEPDA** and preliminary hearings in all other appeals and applications. At the completion of all hearings, Questionnaires will be sent to all parties to ascertain their level of satisfaction with the process and assist the Tribunal in improving its services. The Tribunal will monitor the success of pre-hearing conferences and preliminary hearings by tracking the cases that are resolved prior to the hearing.
Commitment #5: Report on appeals and judicial review of Tribunal Decisions.	The Tribunal will report the outcome of any appeal of its decisions or judicial review applications.	The Tribunal will review and analyze the outcome of any appeal of its decisions or judicial review applications.	The Tribunal will summarize any decision on appeal or judicial review in its Annual Report. The Tribunal will review its practices in light of any appeal or judicial review decisions.

2. Core Function: Staff Processing of Hearings

Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #6: Improve Timeliness in Scheduling Hearings.	Hearings will be scheduled within the timeliness standard.	On average, the Tribunal schedules hearing dates within 30 calendar days from the filing date of the application/appeal and 7 calendar days from the date the Tribunal receives all required information/ documentation from the parties.	On average, staff will continue to schedule within 30 calendar days from the filing date of the application/appeal. In 90% of all cases, staff will adhere to the target of scheduling within 7 calendar days of receiving required information/documentation. The target may not be met in cases where parties have requested that a matter not be scheduled due to settlement discussions.

3. Core Function: Mediation

Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #7: Offer Mediation services in all appeal cases, where appropriate, and on request in application cases, prior to the commencement of the hearing.	When all parties agree to participate, mediation sessions will generally be held at least 30 days prior to the commencement of the hearing.	The Tribunal will increase the number of cases receiving mediation.	The Tribunal will continue to offer mediation services in every appeal and at the request of the parties in applications. Questionnaires will be sent to all parties at the completion of the mediation session to ascertain their level of satisfaction with the process and assist the Tribunal in improving its services. The Tribunal will monitor the success of mediation sessions by tracking the cases that are resolved prior to the hearing.

4. Core Function: Public Access

Goals/Outcomes	Measures	Targets/Standards	2008-2009 Commitments
Commitment #8: The Tribunal will use its website to post decisions and orders, provide information and communicate with the public.	The Tribunal will continue its review of its website to improve ease of access and search capabilities. The Tribunal will continue to track the number of visitors to the site and monitor its use.	The Tribunal will continue to improve the efficiency of the site.	The information contained on the website will be reviewed and improvements made to ensure ease of use for the public. The website will be updated each business day. Any amendments to the Rules of Practice and Practice Directions or publication of the Annual Report will be posted as approved.
Commitment #9: Guides will be updated.	The Tribunal will review its Guides in order to update the information to ensure accuracy and consistency.	The Tribunal will provide accurate information regarding the hearing processes to the public.	The Tribunal will review and revise the Guides as changes to Tribunal Rules, legislation, policies and procedures arise.

Appendix E

Website Statistics – Downloads

During the period April 1, 2007 to March 31, 2008

Most Popular Downloads – Entire ERT Website:

Annual Report 2005-2006	**2,985**
Rules of Practice and Practice Directions of the Environmental Review Tribunal (September 18, 2006)	**2,445**
Niagara Escarpment Plan (June, 2005)	**2,238**
Annual Report 2006-2007 (Released January 2, 2008)	**1,587**
Rules of Practice and Practice Directions of the Environmental Review Tribunal (July 21, 2006)	**790**
Annual Report 1999-2000	**727**
Barlow v. NEC (Minister's Decision issued May 14, 2007)	**677**
Caetano v. NEC (Decision released October 5, 2007)	**597**
Central Milton Holdings Limited and 665497 Ontario Limited (Decision released October, 17, 2007)	**575**
Anne Vallentin v. MOE (Decision released November 22, 2006)	**473**

Appendix F

Financial Report
2007-2008

General Account for the Operation of the Tribunal:

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$1,066,800	$1,066,800	$1,058,537
Transportation and Communications	97,500	97,500	41,683
Services	174,100	174,100	313,162
Supplies and Equipment	97,500	97,500	105,093
Total	$1,435,900	$1,435,900	$1,518,476

Additional Funds Allocated:

Clean Water

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Transportation and Communications	$ 0	$ 0	$ 0
Services	$ 396,400	$ 396,400	$ 83,615
Supplies and Equipment	$ 0	$ 0	$
Total	$ 396,400	$ 396,400	$ 83,615

Nutrient Management Act

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$ 42,800	$ 42,800	$ 0
Transportation and Communications	$ 4,300	$ 4,300	$ 0
Services	$ 60,400	$ 60,400	$ 0
Supplies and Equipment	$ 4,300	$ 4,300	$ 0
Total	$ 111,800	$ 111,800	$ 0

[1] Employee benefits are being managed centrally.

Appendix G

Contact Information

For further information about this report or the Environmental Review Tribunal contact:

The Tribunal Secretary
Environmental Review Tribunal
655 Bay Street
Suite 1500
Toronto, ON M5G 1E5
Telephone: 416-314-4600
Fax: 416-314-4506
Email: **ERTTribunalsecretary@ontario.ca**

Website: www.ert.gov.on.ca